Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THOMAS WARREN WHISENHANT,

Petitioner,

v.

RICHARD ALLEN, Commissioner of the Alabama Department of Corrections,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE – NO DATE OF EXECUTION SET

QUESTION PRESENTED

Whether the Court of Appeals for the Eleventh Circuit's ruling that the petitioner had to prove that the trial judge was actually biased against him is in direct conflict with this Court's rulings in *In re Murchsion*, 349 U.S. 133 (1955), and its progeny, which hold that the likelihood of or potential for bias may be unconstitutionally intolerable even without proof of actual bias.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Whisenhant respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit below.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying a rehearing en banc is set out at App. 166-67. The opinion of the panel denying Whisenhant's appeal from the denial of his petition for a writ of *habeas corpus* is reported as *Whisenhant v. Allen*, 556 F.3d 1198 (11th Cir. 2009), and is set out at App. 1-27. The opinion of the United States District Court for the Southern District of Alabama denying habeas relief is reported as *Whisenhant v. Campbell*, 2008 Ala. LEXIS 205 (S.D. Ala. Oct. 20, 2004) and is set out at App. 28-165.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its decision on February 3, 2009, and denied a timely motion for rehearing on April 20, 2009. Accordingly, this petition was initially due on July 20, 2009. The Court granted an extension of time to August 19, 2009, for the filing of this

petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution and the federal habeas corpus statute for persons held pursuant to a judgment of a state court, 28 U.S.C. § 2254.

STATEMENT OF THE CASE

This is a capital case in which the petitioner, Thomas Whisenhant, was sentenced to death by a judge who participated in an *ex parte* scheme to paper over a potential error. Mr. Whisenhant committed a series of notoriously gruesome murders in the 1970s in Mobile, Alabama. His trials were high-profile events marred by prosecutorial misconduct and questionable defense tactics. What he needed most was a fair and impartial trial judge. Instead, what he got was a judge who colluded with the prosecution. Despite abundant evidence of the collusion, the Court of Appeals for the Eleventh Circuit denied habeas relief, finding that Mr. Whisenhant had failed to prove that the trial judge was actually biased against him. The decision directly conflicts with eighty years of Supreme Court precedent, reaffirmed just last term

in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009), holding that the likelihood of or potential for bias may be unconstitutionally intolerable even without proof of actual bias. Because the court of appeals applied the wrong standard, the petition for certiorari should be granted. However heinous Mr. Whisenhant's crimes may have been, he was entitled to a trial untainted by excessive prosecutorial zeal and presided over by a judge whose impartiality could not reasonably be questioned.

I. The Circumstances of the Crime

On October 16, 1976, Mr. Whisenhant abducted, raped, and murdered Cheryl Lynn Payton. Two days later, he returned to the scene of the crime and mutilated her body. He was apprehended the same day and confessed not only to the Payton murder and mutilation but also to killing two other women – Venora Hyatt and Patricia Hitt. He also admitted to the ritualistic, post-mortem mutilation of Hyatt's corpse.[1] Due to the heinous nature of the killings, the case received widespread publicity throughout the state of Alabama and became a rallying cry for politicians who wanted to prove they were tough on crime.

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[1] The 1979 decision of the Alabama Court of Criminal Appeals in this case contains an extensive statement of the facts concerning the nature of the crime. *See Whisenhant v. State*, 370 So.2d 1080 (Ala. Crim. App. 1979), *cert. denied*, 370 So.2d 1106 (Ala. 1979).

II. The Trials

Mr. Whisenhant's first trial took place in 1977. Because of the extensive publicity surrounding the case, the trial was moved from Mobile County to Jefferson County, Alabama. Charles Graddick, the Mobile District Attorney, was the lead prosecutor; Morris Dees, from the Southern Poverty Law Center, spearheaded the defense. The facts surrounding the rape and murder were not disputed, but the issue of Mr. Whisenhant's sanity was "hotly contested." *Whisenhant v. State*, 370 So.2d at 1103 (Bookout, J., concurring). Defense experts testified that Mr. Whisenhant was insane; the State countered with expert testimony of its own and a parade of Mr. Whisenhant's co-workers and friends who testified that he appeared to be normal. The jury found Mr. Whisenhant guilty, and the trial court sentenced him to death. On appeal, the case was reversed, because, *inter alia,* the prosecutor had made "highly improper . . . prejudicial and reckless remarks" during his closing argument. *Id.* at 1102.

Mr. Whisenhant was tried again in 1981. Before the trial, a dispute erupted between the local district attorney and the state Attorney General, each of whom wanted the publicity and political glory of prosecuting a high-profile serial killer. Mr. Graddick, the local district attorney who had tried the first case, had used his prosecution of Mr. Whisenhant in his campaign for Attorney General. After being elected, he took the case files with him to the Attorney General's office and intended to try the case again.

But Chris Galanos, the new Mobile County district attorney, sued to have the files returned to him and to establish his right to try the case. The dispute went all the way to the Alabama Supreme Court. The court sided with Mr. Graddick. *See Graddick v. Galanos*, 379 So.2d 592 (Ala. 1980).

At the 1981 trial, defense counsel rested without offering any evidence, despite the fact that insanity was Mr. Whisenhant's only defense and that his counsel had considerable evidence of his insanity at their disposal. Defense counsel's sole basis for their "trial strategy" of sitting on their hands and not putting on a shred of evidence was their belief that they had "locked-in error" under *Ake v. Oklahoma*, 470 U.S. 68 (1985), once the trial judge had denied their motion for funds for a psychiatrist. Predictably, Mr. Whisenhant was again convicted and sentenced to death.

In November 1982, the Alabama Court of Criminal Appeals affirmed Mr. Whisenhant's conviction, but overturned his death sentence because of yet *another* improper prosecutorial argument. *Whisenhant v. State*, 482 So.2d 1225, 1239 (Ala. Crim. App. 1982); *see also Ex parte Whisenhant*, 482 So.2d 1247 (Ala. 1984) (ordering a new sentencing hearing).

The third penalty phase trial was held in February 1987. Although Mr. Galanos, the Mobile County district attorney, participated in the case, the prosecution was directed by Edward Carnes, the head of the Alabama Attorney General's capital litigation

unit. (Mr. Carnes now sits on the Eleventh Circuit Court of Appeals.) After a penalty trial that focused on Mr. Whisenhant's mental condition, he was sentenced to death. His sentence was affirmed on appeal, *see Whisenhant v. State*, 555 So.2d 219 (Ala. Crim. App. 1988); *Ex parte Whisenhant*, 555 So.2d 235 (Ala. 1989), and this Court denied a petition for writ of certiorari. *Whisenhant v. Alabama*, 496 U.S. 943 (1990).

III. Collusion Between the Judge and the Prosecution

In 1990, Mr. Whisenhant filed a state post-conviction petition. In 1996, three days before the post-conviction hearing, Mr. Whisenhant's counsel uncovered evidence, hidden by the state since 1987, that Judge Ferrill McRae, the judge who presided over all of Mr. Whisenhant's trials, had participated in a partisan, *ex parte* scheme with the prosecution team (led by Mr. Carnes). The object of the scheme was to paper over a potential *Ake* error that had occurred during the 1981 guilt phase of the case.

Before the 1987 penalty phase trial, Mr. Whisenhant's counsel had filed a motion under *Ake v. Oklahoma* seeking funds for psychiatric assistance. Seeing an opportunity to neutralize any claim of error from Judge McRae's refusal to provide funds for a psychiatrist at the 1981 guilt phase trial, Mr. Carnes drafted an order that granted the motion, but also gratuitously opined, in great detail, that Mr.

Whisenhant had not been prejudiced by the 1981 denial of funds. *See* App. 169-70.

Mobile District Attorney Chris Galanos handed the draft order directly to Judge McRae, along with a hand-written cover note. The cover note was written by Mr. Galanos and explained what the draft order was trying to accomplish:

> Judge:
>
> Attached are two proposed orders in *Whisenhant* **drafted by Carnes** for your consideration.
>
> **The one relating to access to a psychiatrist enumerates facts intended to preclude *Ake* error during the guilt stage**, but I am not sufficiently familiar with the facts to determine the accuracy of the order.
>
> **Let me know what you want to do.**
>
> Chris

App. 168 (emphasis added). There was no certificate of service, and neither the proposed order nor cover note was ever served on the defense – a fact admitted by Mr. Galanos at the state post-conviction hearing. Judge McRae simply added a case caption, changed one number, and entered the order as his own at a hearing the following day. At the hearing, he never

asked defense counsel if they had seen the proposed order.[2]

The prosecution hid the draft order and cover note for nine years. Although the court granted Mr. Whisenhant access to the district attorney's case file in 1992 as part of post-conviction discovery, the cover note and proposed order were never produced. Mr. Whisenhant's counsel did not discover the documents until three days before the post-conviction hearing in 1996, when defense counsel was permitted for the first time to review the prosecution's files without the supervision of a member of the attorney general's office. A stick-on note on the prosecution file that contained the documents stated: "*Ck. w/Ed Re: unsigned orders*." App. 171. The note was written by a former assistant attorney general who had worked under the supervision of *Ed* Carnes and was responsible for producing the post-conviction discovery. The only reasonable inference that can be drawn from the circumstances is that the State suppressed the documents not only at the 1987 trial, but also during most of the post-conviction proceedings as well.

Upon discovering the documents, defense counsel immediately filed a motion to recuse Judge McRae

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[2] The court of appeals recently noted that it was "troubled by many of [Judge McRae's] comments" in a death penalty case and that "[i]n a number of instances, the judge appeared to take on the role of an advocate against [the defendant's] ineffective assistance claims." *Williams v. Allen*, 542 F.3d 1326, 1348 n.13 (11th Cir. 2008).

from presiding over the state post-conviction hearing and amended the petition to include a due process claim based on Judge McRae's probable bias. On the day of the hearing, Judge McRae recused himself. Despite abundant evidence of the *ex parte* communication and subsequent cover-up, the state trial court denied Mr. Whisenhant's claim, and the Alabama Court of Criminal Appeals affirmed in an unpublished memorandum.

Having exhausted state post-conviction remedies, Mr. Whisenhant filed a federal habeas petition identifying numerous grounds for relief pursuant to 28 U.S.C. § 2254. The district court denied the petition, *Whisenhant v. Campbell*, 2008 Ala. LEXIS 205 (S.D. Ala. Oct. 20, 2004), and the Eleventh Circuit affirmed. *Whisenhant v. Allen*, 556 F.3d 1198 (11th Cir. 2009).

IV. The Court of Appeals' Decision

In denying Mr. Whisenhant's judicial bias claim, the court of appeals opined, as an initial matter, that it could "only speculate as to what [Judge McRae] knew and did not know," because Mr. Whisenhant's counsel did not call the judge as a witness at the state post-conviction hearing. App. 22. (The judge who presided over the post-conviction hearing strongly discouraged petitioner's counsel from calling Judge McRae as a witness; in any event, it was so obvious that Judge McRae knew he was being *ex parted* that the State did not contest the point at the hearing.)

Addressing the merits, the court of appeals held that, even if Judge McRae knew that Mr. Whisenhant's defense counsel were not served with the draft order, the petitioner failed to prove that the judge was actually biased against him. Indeed, the court concluded that Judge McRae was not biased because "the [*ex parte*] order granting Whisenhant's motion for funds benefitted the defense." App. 25.

REASON FOR GRANTING THE WRIT

CERTIORARI IS WARRANTED BECAUSE THE COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT

The Court of Appeals for the Eleventh Circuit denied the petitioner's judicial bias claim on the merits, reasoning that "there is no Supreme Court decision clearly establishing that an appearance of bias or partiality, where there is no actual bias, violates the Due Process Clause or any other constitutional provision." App. 22. The court held that the petitioner could only establish actual judicial bias by showing that "the judge has a pecuniary interest in the outcome [of the case] or has been personally abused or criticized by the party before him." App. 23.

The court of appeals' holding is in direct conflict with eighty years of this Court's precedent. Just six weeks after the court denied rehearing, this Court reaffirmed in *Caperton v. A.T. Massey Coal Co.* that "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias." 129 S.Ct. at 2263. "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 2262.

Especially where, as here, a man's life is at stake, such a clearly erroneous application of this Court's law cannot stand. Because the court of appeals' decision directly conflicts with the clearly established decisions of this Court, certiorari should be granted and the decision below should be reversed. In the alternative, the case should remanded to the court below for the proper determination of whether, under the objective standard for determining judicial bias reaffirmed in *Caperton*, Mr. Whisenhant has demonstrated that the probability of judicial bias in this case is intolerably high.

I. The Court has Long Recognized that Factual Circumstances Objectively Demonstrating a Risk of Actual Bias Offend Due Process

Since its first case addressing judicial partiality, *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court has

decided a long line of cases in which it has recognized repeatedly that allowing a judge to preside where a sufficient factual basis exists to infer bias or the probability of bias offends due process. Last term, the Court reaffirmed this precedent in *Caperton v. A.T. Massey Coal Co.*: "Under [the Court's] precedents, there are objective standards that require recusal when 'the probability of actual bias on the part of the judge is too high to be constitutionally tolerable.'" 129 S.Ct. at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). "[O]bjective standards may also require recusal whether or not actual bias exists or can be proved. Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Id.* at 2265 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "In defining these [objective] standards, the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 2263 (quoting *Withrow*, 421 U.S. at 47).

The court of appeals failed to apply these objective standards in this case. The court should have considered whether, under the facts here, Judge McRae was "'likely' to be neutral, or whether there [wa]s an unconstitutional 'potential for bias.'" *Id.* at 2262. Instead, the court erroneously held that "'there is no Supreme Court decision clearly establishing

that an appearance of bias or partiality, where there is no actual bias, violates the Due Process Clause or any other constitutional provision.'" App. 22.

The court of appeals ruled that Mr. Whisenhant could only prevail on his judicial bias claim by showing that the facts of his case fit into one of two narrow categories: (1) cases where the judge had a pecuniary interest in the outcome of the case; or (2) cases where a party or his counsel had "personally abused or criticized" the judge. *See* App. 23; *see also* App. 25 ("It is clear that the judicial bias cases cited by Mr. Whisenhant involve totally different facts from his own case.").

By only considering whether Judge McRae's conduct fit into one of two fixed, narrow set of facts, the court of appeals clearly erred. Over the course of eighty years, culminating last term in *Caperton*, the Court has identified numerous factual circumstances where the potential for judicial bias was too great to be constitutionally tolerable. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (judge had direct financial interest in reaching a particular result); *Offutt v. United States*, 348 U.S. 11 (1954) (judge summarily found attorney guilty of contempt after becoming involved in a direct conflict with him); *In re Murchison*, 349 U.S. 133 (1955) (judge both investigated and prosecuted a criminal matter); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (judge hearing contempt proceeding had been vilified and slandered by contemnor); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (judge had

responsibility over municipal finances that stood to benefit from his rulings); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (judge was lead plaintiff in pending case against one of the litigants before him); *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009) (state supreme court justice refused to recuse himself from hearing the appeal of a $50 million judgment, even though the justice had received millions in campaign contributions from one of the parties to the appeal).

The holdings of this Court illustrate that the circumstances under which a judge's continued involvement in a case offends due process do not fall into a few fixed and narrow categories, as assumed by the court below. Instead, this Court's precedent demonstrates that the due process clause requires a factual inquiry into whether the particular circumstances present in a case pose such a risk of actual bias or prejudgment that the practice at issue or the conviction that resulted cannot be tolerated.

II. The Trial Judge's *Ex Parte* Communication with the Prosecutor and the Subsequent Cover-up Are Circumstances Presenting an Unconstitutionally Intolerable Risk of Bias

"There are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 129 S.Ct. at 2259

(quoting *Withrow*, 421 U.S. at 47). This is one of those cases.

Judge McRae engaged in secret, *ex parte* communication with the prosecution, in violation of Alabama Canon of Judicial Ethics 3(A)(4).[3] The object of their collusion was to protect one of the judge's previous rulings from reversal on appeal or collateral review. The prosecution hid the evidence of the *ex parte* contact for almost a decade. By allowing himself

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[3] Inexplicably, the court of appeals stated that it could "only speculate as to what [Judge McRae] knew and did not know" because Mr. Whisenhant's counsel did not call the judge as a witness at the state post-conviction hearing. App. 21-22. But it was so patently obvious that Judge McRae knew the proposed order was *ex parte* that the State never even contested the fact – nor did the state trial court or district court below take issue with this point. Moreover, the judge who presided at the post-conviction hearing strongly discouraged defense counsel from calling Judge McRae to testify: ***"I don't intend to let you call a judge as a defendant – or as a witness in this case.*** I mean, unless you can demonstrate to me that it is absolutely essential." And it was *not* essential – the State never claimed during the post-conviction proceedings that Judge McRae did not know the draft order was *ex parte* and the evidence that he knew it was overwhelming. There was no notation on the cover note that a copy was being sent to defense counsel, and there was no certificate of service attached. The content of the cover note – stating that the proposed order was "intended to preclude *Ake* error" and asking the judge to "[l]et me know what you want to do" – made it obvious that the State never intended for defense counsel to see the documents. *See* App. 168-70. The draft order was handed to Judge McRae one day before the hearing when he signed the order. At the hearing, Judge McRae never asked defense counsel if they had received a copy of the proposed order.

to be co-opted by the prosecution, Judge McRae's conduct reflected that he had become a partisan who could not "weigh the scales of justice equally between the contending parties." *Murchison*, 349 U.S. at 136.

The court of appeals found that Judge McRae was not biased because "the [*ex parte*] order granting Whisenhant's motion for funds benefitted the defense." App. 25. But this conclusion entirely misses the point. The question is not whether the draft order gave the defense the funds it sought. Rather, the question is whether the partiality of a judge who allows himself to be enlisted by the prosecution in a clandestine scheme can reasonably be questioned.

Imagine if this Court were to knowingly accept from the Solicitor General a secret, *ex parte* draft opinion, along with a handwritten cover note explaining that the draft opinion was intended to promote the Solicitor's view of the proper evolution of the law. This Court would rightly be condemned for such conduct, regardless of whether the proposed opinion itself reflected the current consensus of the legal community. It would be the spectacle of the Court's surreptitious cooperation with the Solicitor General that would offend all notions of impartiality and fair play.

Under the objective standard for evaluating the probability of judicial bias required by this Court's precedent and recently reaffirmed in *Caperton*, Mr. Whisenhant's death sentence cannot stand. At the

very least, the Court should remand the case for the proper consideration of the petitioner's claim.

CONCLUSION

Certiorari should be granted to review the decision below.

Respectfully submitted,

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THOMAS WARREN WHISENHANT, Petitioner-Appellant, versus RICHARD F. ALLEN, Commissioner, Alabama Department of Corrections, Respondent-Appellee.

No. 04-15810

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

556 F.3d 1198; 2009 U.S. App. LEXIS 2053; 21 Fla. L. Weekly Fed. C 1452

February 3, 2009, Decided
February 3, 2009, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Southern District of Alabama. D.C. Docket No. 02-00397-CV-WS-C.

Ex parte Whisenhant, 555 So. 2d 235, 1989 Ala. LEXIS 654 (Ala., 1989)

JUDGES: Before EDMONDSON, Chief Judge, and BIRCH and BLACK, Circuit Judges.

OPINION

PER CURIAM:

This is a death penalty case in which petitioner-appellant, Thomas Warren Whisenhant, appeals the district court's denial of his 28 U.S.C. § 2254 petition for federal habeas relief. Whisenhant raises four claims in this appeal: (1) his counsel was ineffective

at his 1981 guilt phase trial for failing to present his only defense of insanity; (2) the state failed to disclose exculpatory evidence during the 1981 trial and a 1987 penalty phase trial; (3) the prosecutor's closing argument at the 1981 trial was fundamentally unfair; and (4) the trial judge's *ex parte* dealings with prosecutors prior to the 1987 penalty phase trial violated Whisenhant's due process right to an impartial judge. We conclude that the district court properly denied habeas relief and AFFIRM.

I. BACKGROUND

On a rainy night in October 1976, Whisenhant abducted 24-year-old Cheryl Lynn Payton at gunpoint from a convenience store in Theodore, Alabama, where she was working alone.[1] Whisenhant drove her to a remote area, raped her in his truck, and then took her into the woods where he shot her in the head, killing her. He later returned twice to the woods and mutilated Payton's body with his knife. After police officers apprehended him, Whisenhant confessed to the rape, killing, and mutilation of Payton. He also confessed to killing within the past

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[1] A detailed statement of facts set forth in *Whisenhant v. State*, 370 So. 2d 1080, 1081-86 (Ala. Cr. App. 1979), was adopted by the Alabama Supreme Court in *Ex Parte Whisenhant*, 555 So. 2d 235 (Ala. 1989).

year two other female convenience store clerks and mutilating one of them.[2]

At the 1977 trial for Cheryl Payton's murder, Whisenhant presented numerous witnesses to establish an insanity defense. In particular, a noted psychiatrist, Dr. Claude L. Brown, testified that Whisenhant had a mental disease and that he had lost the power to distinguish right from wrong when he had killed Payton. *Whisenhant,* 370 So.2d at 1089. The jury rejected the insanity defense, and Whisenhant was convicted and sentenced to death. The Alabama Court of Criminal Appeals reversed his conviction, however, based on the prosecutor's improper closing argument and a fatal variance between the indictment and judgment. *Whisenhant v. State,* 370 So.2d 1080, 1103 (Ala. Cr. App. 1979), *cert. denied,* 370 So. 2d. 1106 (Ala. 1979).

A second jury trial was held in 1981. Prior to trial, Whisenhant's attorneys filed a motion for $3500 to hire two psychiatrists who had evaluated Whisenhant before the 1977 trial, and a more general motion for funds for expert witnesses. The trial court denied the first motion and granted the statutory cap of $500 for the second motion. Whisenhant's counsel firmly believed the trial court committed reversible error by denying Whisenhant's motion for funds for

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[2] Whisenhant pled guilty in 1981 to the first-degree murders of Venora Hyatt and Patricia Hitt and received a sentence of life without parole for each offense.

the psychiatrists, and decided not to present any evidence of insanity. Whisenhant was again convicted and sentenced to death.

On appeal, Whisenhant raised the perceived error of the trial judge's denial of his motion for funds, but the Alabama Court of Criminal Appeals found no constitutional violation. *Whisenhant v. State,* 482 So. 2d 1225, 1228-30 (Ala. Cr. App. 1982). Although the Alabama court affirmed his conviction, it reversed his death sentence based on the prosecutor's improper opening statement at the sentencing phase, which mentioned other crimes allegedly committed by Whisenhant that were not introduced at trial. *Id.* at 1239-40. After further appellate review, the Alabama Supreme Court declared the error was not harmless and remanded the case for a new sentencing trial. *Ex Parte Whisenhant,* 482 So. 2d 1247, 1249 (Ala. 1984) (per curiam).

In 1987, a third penalty phase proceeding occurred. At this proceeding, Whisenhant again presented evidence of mental illness but a jury unanimously voted to sentence Whisenhant to death for the third time. The Court of Criminal Appeals affirmed the death sentence, as did the Alabama Supreme Court. *Whisenhant v. State,* 555 So. 2d 219 (Ala. Cr. App. 1988); *Ex parte Whisenhant v. State,* 555 So. 2d 235 (Ala. 1989). The United States Supreme Court denied Whisenhant's petition for writ of certiorari. *Whisenhant v. Alabama,* 496 U.S. 943, 110 S. Ct. 3230, 110 L. Ed. 2d 676 (1990).

Whisenhant then began state habeas corpus proceedings by filing an Alabama Rule of Criminal Procedure Rule 32 petition. During discovery, Whisenhant received two FBI reports made after the murder of Venora Hyatt, which provided speculative profiles about the unidentified killer. Whisenhant also discovered a statement made to police officers by his co-worker Sandra Heverly who described Whisenhant as "weird." R1-14, Exh. Vol. 39 at 362-67. Based on these documents, Whisenhant amended his complaint in 1995 to include a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Shortly before the Rule 32 hearing in October 1996, Whisenhant discovered a draft order granting Whisenhant's motion for funds to hire a psychiatrist. Prior to the 1987 trial, prosecutor Chris Galanos had given this proposed order to the trial judge, Circuit Judge Ferrill D. McRae, but not to defense counsel. Judge McRae entered an order the next day similar to the draft order but increased the amount of funds to $2,200. Based on this discovery, Whisenhant added a claim of judicial bias to his state habeas petition and moved to recuse Judge McRae from the Rule 32 proceedings. Judge McRae granted the motion for recusal "out of an abundance of caution and to avoid all appearance of impropriety." R1-14, Exh. Vol. 36 at 319. After the Rule 32 hearing, Judge Braxton Kittrell denied the habeas petition in its entirety. The Alabama Court of Criminal Appeals affirmed the denial in an unpublished memorandum. The Alabama

Supreme Court denied Whisenhant's petition for a writ of certiorari.

Having exhausted state court post-conviction remedies, Whisenhant filed a federal habeas petition pursuant to 28 U.S.C. § 2254. In a detailed 81-page order, the district court analyzed each of Whisenhant's fourteen claims before denying habeas relief. Whisenhant filed a motion for a certificate of appealability (COA), which the district court denied in part and granted on four grounds: (1) whether the trial court's denial of his motion for funds to employ psychiatrists prior to the 1981 guilt phase trial violated *Ake v. Oklahoma,* 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); (2) whether the prosecution's failure to disclose two FBI profiles and Sandra Heverly's statement until after the 1987 penalty phase trial violated *Brady;* (3) whether the inclusion of venire members at the 1981 trial who knew that Whisenhant had been convicted at his 1977 trial violated *Irvin v. Dowd,* 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); and (4) whether the trial judge's ex parte dealings with prosecutors prior to the 1987 penalty phase trial concerning the proposed order for funds violated *In re Murchison,* 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

Whisenhant then filed in this court an application for a COA on two of his denied claims: (1) ineffective assistance of counsel at the 1981 guilt phase trial for failure to present an insanity defense, and (2) prosecutorial misconduct at the 1981 trial based on the prosecutor's closing argument that no

co-worker had testified Whisenhant was insane. We granted a COA on these two issues.

In his § 2254 appeal brief, Whisenhant states he has dropped the issues of whether the trial court's denial of his motion for funds violated *Ake,* and whether the jury composition violated *Irvin.* Because he does not raise these claims in his brief to us, these claims are abandoned. *See Hendrix v. Secretary, Florida Dep't. of Corr.,* 527 F.3d 1149, 1154 (11th Cir. 2008) (per curiam). We turn now to his remaining four claims for habeas relief.

II. DISCUSSION

A. Claim of Ineffective Assistance of Counsel

Whisenhant contends that he received ineffective assistance of counsel at his 1981 guilt phase trial because his attorneys failed to present any evidence that he was insane. He concedes that this decision was strategic – counsel believed the trial judge's denial of their motion for funds for psychiatrists was a locked-in error that would be disturbed if they presented evidence of insanity. Whisenhant argues that this strategy was unreasonable, however, in light of the voluminous evidence from the 1977 trial and his prior medical records. Morever, Whisenhant asserts that he was prejudiced by his attorneys' deficient performance because there was a reasonable probability of a different result had they presented the 1977 trial evidence, coupled with the two FBI

reports and Sandra Heverly's statement that the state should have disclosed.

In order to obtain federal habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Whisenhant must show that the state court decision adjudicating his claims (1) was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedents, or (2) unreasonably determined the facts in light of the evidence presented in the state courts. 28 U.S.C. § 2254(d). The first prong means that a state court identified the correct governing legal principle but unreasonably applied it to the facts of a petitioner's case. *Wiggins v. Smith,* 539 U.S. 510, 520, 123 S. Ct. 2527, 2534-35, 156 L. Ed. 2d 471 (2003). To satisfy this standard, the state court's application must have been "'objectively unreasonable,'" not just incorrect or erroneous. *Id.* (quotation omitted).

The state habeas court and the Alabama Court of Criminal Appeals correctly analyzed Whisenhant's claim under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires the petitioner to show both that his counsel's performance was deficient, and that the deficiency prejudiced his defense. 466 U.S. at 687, 104 S. Ct. at 2064. Both state courts found that trial counsels' strategy was reasonable, and that the result of the proceeding would not have been different if evidence of insanity had been presented.

An attorney's performance is deficient if the acts or omissions of counsel, in light of all the circumstances and facts of the particular case fall "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066. The Supreme Court cautioned appellate courts not to second-guess counsel's assistance, noting how easy it is to view counsel's performance as unreasonable after an unsuccessful defense. *Id.* at 689, 104 S. Ct. at 2065. "Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689, 104 S. Ct. at 2065. To counteract the distorting effects of hindsight, the defendant bears the burden of overcoming a strong presumption that the challenged action is sound trial strategy. *Id.* at 689, 104 S. Ct. at 2065.

Whisenhant concedes that his trial attorneys made a strategic decision not to present any evidence of insanity but argues that this decision was unreasonable. Whisenhant argues that because trial counsel *could* have presented evidence of insanity, he *should* have. He asserts that trial counsel could have subpoenaed Dr. Brown, could have called a former police officer to testify about Whisenhant's behavior as a youth, could have read into evidence testimony and medical reports introduced at the 1977 trial, could have used the $500 granted by the trial court to hire experts instead of obtaining a serologist's report, and could have presented Whisenhant's federal prison medical records. Because this evidence was

available to trial counsel, Whisenhant argues that it was unreasonable not to use it.

Whisenhant's argument ignores the fact that his attorneys' decision was made after substantial investigation into plausible lines of defense. Morris Dees, an experienced lawyer who founded the Southern Poverty Law Center, was lead counsel in all three of Whisenhant's trials. After investigating the case prior to the 1977 trial, he concluded insanity was Whisenhant's best defense. Dees felt that psychiatric testimony would be the linchpin because Whisenhant's mental illness would not be readily apparent to his friends and neighbors. Dees had serious doubts that jurors at the 1981 trial would accept an insanity defense, however, because "this was a case in their backyard where women were being killed and left dead all around the county." R1-14, Exh. Vol. 38 at 213-14. Unlike the first trial which was held in another county, the 1981 trial was held in the same county the murder had occurred. Dees's assisting trial counsel, John Carroll, also doubted that a jury would accept an insanity defense based on the jurors' strong reactions at the 1977 trial to the horrific details of the murder. As a result, Dees felt that a jury surely would not find Whisenhant insane without live psychiatric testimony.

Dees believed it was "fundamentally unfair" and a violation of due process for the state not to provide an indigent with adequate funds for essential experts. R1-14, Exh. Vol. 38 at 216-17, 219. Dees's foresight proved correct when the Supreme Court decided in

Ake that, pursuant to the Fourteenth Amendment's due process guarantee of fundamental fairness, the state must assure access to a psychiatrist if an indigent defendant's sanity is likely to be a significant factor in his defense. *Ake,* 470 U.S. at 74, 83, 105 S. Ct. at 1091-92, 1096. Although *Ake* was decided four years after the 1981 trial, Dees was aware of literature and laws at that time supporting his views, and he investigated the issue of the state's obligation to provide funds for an indigent. Based on his research, Dees believed the trial court's denial of the motion for funds for a psychiatrist was a "locked-down, lead-pipe, four-square" error in the record. R1-14, Exh. Vol. 39 at 327. Once an error is locked down, Dees explained his trial strategy is to "leave it there because, you know, the idea is to give your client a fair trial; and if the State has messed up by committing an error, then you would be guilty of malpractice if you didn't win on that error." R1-14, Exh. Vol. 38 at 272.

After the trial court denied his motion for funds for a psychiatrist, Dees decided not to present any evidence of insanity. This is why he did not subpoena Dr. Brown to testify or pay Dr. Brown's fee out of his own pocket. Dees also considered but rejected the idea of reading into the record the testimony and reports of witnesses from the 1977 trial. Whisenhant's sister could no longer testify at the 1981 trial because of emotional problems, and Dees believed that her dramatic, emotional testimony at the 1977 trial would not be evident from merely

reading her prior statements. Moreover, Dees felt that reading testimony into the record from the experts or their reports would have been "virtually useless" when the state was presenting live witnesses. *Id.* at 228-29. He also decided not to call Captain Bryant as a witness because his lay opinion about things that happened when Whisenhant was a child would serve little or no purpose without the psychiatric testimony. Given that the $500 granted by the trial court was insufficient to cover the fees for Dr. Brown testifying at trial, Whisenhant decided instead to use the money to test the victim's undergarments for sperm. Dees hoped to find evidence that Whisenhant did not rape the victim, which would provide a critical defense to the charge of capital murder.

In light of all these circumstances, trial counsel's decision not to present any evidence of insanity was a sound trial strategy that "falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065. Trial counsel made an informed, reasonable judgment after thoroughly investigating the law and facts relevant to Whisenhant's case. Such strategic choices are "virtually unchallengeable." *Id.* at 690, 104 S. Ct. at 2066. The state courts' decisions that counsel's performance was not deficient comports with Supreme Court precedent.

Because Whisenhant has failed to satisfy the first requirement of *Strickland,* he cannot succeed on a claim of ineffective assistance of counsel and we,

therefore, need not address whether counsel's performance prejudiced the defense. *See Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064 ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."). Habeas relief is denied on this claim.

B. *Brady* Claim

A COA was also issued on whether the State's failure to disclose two FBI profile reports and a statement by Sandra L. Heverly violated Whisenhant's rights under *Brady.* Both the state habeas court and the Alabama Court of Criminal Appeals determined that the undisclosed documents were not material, which under *Brady* means that Whisenhant has failed to show a reasonable probability of a different result had the documents been disclosed. *United States v. Bagley,* 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985). The Supreme Court has clarified that a defendant need not show he would have received a different verdict with the evidence, but rather that the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995). In determining whether the defendant received a fair trial, a court should consider the suppressed evidence "collectively, not

item by item" since "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Id.* at 434, 436-37, 115 S. Ct. at 1567.

The FBI reports were generated to assist authorities in finding the unknown killer of Venora Hyatt, who was murdered about six months before Cheryl Payton. The first report, based on crime scene photographs, speculates that "[i]f perpetrator is truly schizophrenic, initial attack would probably have taken place in or around the store and would have been both sudden and fatal." R1-14, Exh. Vol. 39 at 356. The second report references the autopsy results and opines that the probable subject suffers from simple schizophrenia and has usually been in contact with the victim on a number of previous occasions. The third undisclosed document is a statement by Sandra Heverly, a co-worker who dated Whisenhant for a few months in 1974. Heverly stated that Whisenhant would wiggle his feet when watching television and giggle even though nothing was funny; his eyes would sometimes get "glassy looking"; he would watch her drive and "grin up a storm"; he was "weird"; and all the people who used to work with him at the ship yard "knew how weird he was." *Id.* at 363-67.

With respect to the materiality of these three documents at the 1981 guilt phase trial, trial counsel testified that he would not have used them given his strategic decision not to offer any evidence of insanity. Because the disclosure of these documents could not

have affected the outcome of Whisenhant's 1981 trial, the Alabama Court of Criminal Appeals correctly determined that these documents were not material. *Bagley,* 473 U.S. at 682, 105 S. Ct. 3383.

Nor were the undisclosed documents material to the 1987 penalty phase trial. Whisenhant's counsel presented numerous witnesses at the 1987 trial who testified about Whisenhant's personality and mental state. Dr. Brown explained in detail how Whisenhant's troubled childhood and domineering mother resulted in a history of violence against women. Dr. Brown diagnosed Whisenhant as a schizoid personality with a mental disease that people around him in daily life would be unlikely to notice given its episodic manifestations. Dr. Brown's conclusions were corroborated by another expert, Dr. Tanay, whose report was read partly into evidence. In summarizing the insanity evidence presented, the district court found that "the defense constructed a detailed mosaic of evidence advancing its position that Whisenhant was under the duress of an extreme mental disturbance, that he was unable to appreciate the criminality of his conduct, and that he otherwise suffered from psychological and emotional problems when he raped and murdered Payton." R1-22 at 34.

In light of all the evidence at the 1987 penalty trial, the marginal value added by the two FBI profile reports and Heverly's statement would not have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435, 115 S. Ct. at 1566. The FBI reports were

speculative profiles involving a different victim that included opinions which both matched and did not match certain aspects of Whisenhant's character and his murder of Cheryl Payton. At best, they would have been cumulative of some of Dr. Brown's expert testimony. Likewise, Heverly's lay opinion that Whisenhant was weird would not have significantly bolstered Dr. Brown's testimony. This is especially true given that Heverly's descriptions contradict Dr. Brown's opinion that Whisenhant's co-workers would not readily notice any strange behavior. It is thus highly unlikely that disclosure of these documents would have changed the outcome of the 1987 trial. The Alabama Court of Criminal Appeals' decision reasonably applied *Brady* and its progeny in determining that the undisclosed information was immaterial and that no *Brady* violation occurred.

C. Prosecutorial Misconduct Claim

Whisenhant next challenges the prosecutor's closing argument at his 1981 guilt phase trial that no co-worker testified Whisenhant was insane. In his closing argument, the prosecutor remarked as follows:

> If these three fine criminal defense lawyers had found any doctor, any friend, any co-worker, anyone that knew the Defendant and they said he was insane, don't you think you would have heard from them? You haven't heard a word, and these three lawyers are very very good. Nobody has come

> in here and said that Tommy ran around eating dirt, did they, running naked and jumping on women at bus stops and that he was insane. No. The reason is simply this, they couldn't find anybody to say it.
>
> Mr. CARROLL: Objection, Judge that's not true.
>
> THE COURT: He has a right to argue his inferences.

R1-14, Exh. Vol. 16 at R618-19. At the same time the prosecutor made this statement, Whisenhant alleges the prosecutor knew the state had deceptively suppressed co-worker Sandra Heverly's statement that Whisenhant was weird. Whisenhant asserts that the prosecutor biased the jurors against a finding that Whisenhant was mentally ill and deprived him of the opportunity to object to the improper statement, thereby violating his due process rights under *Darden v. Wainwright,* 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

In *Darden,* the Supreme Court recognized that a defendant's due process right to a fair trial is not infringed by a prosecutor's remarks that are "undesirable or even universally condemned." 477 U.S. at 181, 106 S. Ct. at 2471 (citation and punctuation omitted). Instead, the comment must have infected the trial with such unfairness that the conviction constitutes a denial of due process. *Id.* at 181, 106 S. Ct. at 2471 (citation and punctuation omitted). Any challenged remarks must be evaluated

in context based upon the defense argument that preceded it. *Id.* at 179, 106 S. Ct. at 2470. Where the "objectionable content was invited by or was responsive to the opening summation of the defense," a reviewing court must determine the comment's effect on the trial as a whole. *Id.* at 182, 106 S. Ct. at 2472.

As in *Darden,* the prosecutor's challenged comment here was responsive to the defense's closing argument and did not misstate the evidence. Whisenhant's attorney argued that Whisenhant was insane, as evidenced by the brutal facts of the murder, and Whisenhant's confession that he did not know why he killed the victim and could not control his actions. The prosecutor then responded by pointing out that no co-workers had testified Whisenhant was insane. This comment did not misrepresent Heverly's statement, which never characterized Whisenhant as insane, only "weird." R1-14, Exh. Vol. 39 at 365. Heverly denied that Whisenhant ever threatened her, used any violence against her, or even made any sexual advances toward her. Moreover, Heverly lost contact with Whisenhant in 1975 and his allegedly strange behavior occurred while they were dating in 1974, approximately two years before Cheryl Payton's murder in 1976. Based on the foregoing, the Alabama Court of Criminal Appeals correctly found that the prosecutor's argument was correct because the "behavior described by Sandra Heverly clearly fell short of insanity." R1-14, Exh. Vol. 42, R44 at 4.

Whisenhant argues that the prosecution's suppression of Heverly's statement precluded him from objecting to the improper statement. As noted, however, Whisenhant's attorney did object to the prosecutor's comments that the defense could not find anybody to say Whisenhant was insane, but the trial judge overruled the objection as a permissible argument. In light of the overwhelming evidence of Whisenhant's guilt and defense counsel's tactical decision not to present any evidence of insanity, the likelihood that the jury's decision was influenced by the prosecutor's isolated comment is minimal. *See Darden,* 477 U.S. at 182, 106 S. Ct. at 2472 (heavy weight of evidence against petitioner reduced the likelihood that an improper closing argument influenced the jury).

Viewing the trial as a whole, we conclude the prosecutor's invited response about the lack of insanity testimony by a co-worker did not render Whisenhant's trial fundamentally unfair. *See United States v. Frazier,* 944 F.2d 820, 825-26 (11th Cir. 1991) (no due process violation where defense invited prosecutor's rebutting argument and there was overwhelming evidence of defendant's guilt). Whisenhant is, therefore, not entitled to habeas relief on his claim of prosecutorial misconduct.

D. Claim of Judicial Bias

In his final claim for habeas relief, Whisenhant asserts that the trial judge's bias and his appearance

of partiality at the time of the 1987 penalty phase trial violated *In re Murchison,* 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Specifically, Whisenhant alleges that Judge McRae had an *ex parte* communication with the prosecution before the 1987 trial in order to cover up a potential error that occurred in the 1981 trial. This purported scheme between Judge McRae and the prosecution deprived him of his constitutional right to an impartial judge.

Prior to the 1987 penalty phase trial, Whisenhant filed a motion for funds for a psychiatrist. Chris Galanos, the Mobile County District Attorney in 1987, gave Judge McRae a draft order granting that motion. Galanos attached a handwritten cover note stating that the order "enumerates facts intended to preclude *Ake* error during the guilt stage, but I am not sufficiently familiar with the facts to determine the accuracy of the order. Let me know what you want to do." R1-14, Exh. Vol. 36 at 314. After making some minor revisions and increasing the amount of the funds from $2000 to $2200, Judge McRae entered an order the next day granting Whisenhant's motion.

The state habeas court found that this claim was procedurally defaulted and, alternatively, lacked merit because even assuming the trial judge had ex parte communications with the prosecutor, the result was that Whisenhant received the money he had requested. The Alabama Court of Criminal Appeals only considered the claim on its merits. It found there was no evidence that the trial judge knew the motion

was not served on the defense. There was also no potential error to be covered up because Judge McRae's denial of the 1981 motion for funds had already been affirmed on appeal before the draft order was submitted. *See Whisenhant v. State,* 482 So. 2d 1225, 1228-30 (Ala.Cr.App. 1982). Finally, the trial judge's order granted the funds Whisenhant had sought. Based on the foregoing, the Alabama Court of Criminal Appeals determined that Whisenhant failed to offer any evidence that the trial judge was personally biased or partial.

Whisenhant challenges the finding by the Court of Criminal Appeals that Judge McRae did not know the motion was not served on the defense. He claims this finding is based on an unreasonable determination of the facts in light of the evidence presented at the Rule 32 proceeding. Factual findings by a state court are presumed correct unless the appellant rebuts the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Henyard v. McDonough,* 459 F.3d 1217, 1240 (11th Cir. 2006) (per curiam), *cert. denied,* 549 U.S. 1284, 127 S. Ct. 1818, 167 L. Ed. 2d 328 (2007). Whisenhant had a full and fair opportunity to present evidence on this issue at the state habeas hearing. At that hearing, Whisenhant called as a witness Chris Galanos, who admitted he did not serve Whisenhant's trial attorneys with a copy of the draft order. Whisenhant did not ask Galanos whether he told Judge McRae that fact, however. Nor did Whisenhant call Judge McRae as a witness. Although the habeas judge

stated that Judge McRae should only be called as a witness if "absolutely essential," the habeas judge did not forbid Whisenhant from doing so. R1-14, Exh. Vol. 37, State Habeas Corpus Hearing on 24 October 1996 at 1-2. Without Judge McRae's testimony, we can only speculate as to what he knew and did not know. The burden was on Whisenhant to prove his claimed violation, and he has failed to do so. *See Hendrix,* 527 F.3d at 1153 (state court's finding was a reasonable determination of the facts where petitioner failed to present evidence at the state habeas hearing to support his claim). Thus, Whisenhant has not presented clear and convincing evidence to rebut the presumption of correctness afforded to the state court's factual finding.

Even if Judge McRae had known that the defense did not receive a copy of the draft order, Whisenhant has failed to establish a constitutional violation. To the extent that Whisenhant argues that Judge McRae's "appearance of partiality" violates his due process rights, we have held that "there is no Supreme Court decision clearly establishing that an appearance of bias or partiality, where there is no actual bias, violates the Due Process Clause or any other constitutional provision." *Id.* at 1153; *see also Davis v. Jones,* 506 F.3d 1325, 1336-37 (11th Cir. 2007) (no due process violation where petitioner claims only an appearance of partiality and not actual bias). Thus, in so far as Whisenhant claims the trial court's *ex parte* actions created an appearance of partiality, we conclude that the state courts' rejection

of Whisenhant's claim of judicial bias was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

With respect to Whisenhant's claim of actual bias, he fares no better. It is long established that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. at 136, 75 S. Ct. at 625. The Supreme Court has identified various situations in which "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975). Such cases include those in which the judge has a pecuniary interest in the outcome or has been personally abused or criticized by the party before him. *Id.*

None of the cases cited by Whisenhant are analogous to his own. *In re Murchison* involved a judge acting under state law as a one-man grand jury who later charged the witnesses with contempt based on their grand jury testimony, then tried and convicted them. 349 U.S. at 134-35, 75 S. Ct. at 624-25. The judge based his judgment of contempt on his own personal knowledge and impressions of what had occurred in the grand jury room, including his opinions that the witness was insolent and defiant, even though the judge's opinions could not be cross-examined. *Id.* at 138, 75 S. Ct. at 626. The Supreme Court held that it was a violation of due process for "a judge to act as a grand jury and then try the very

persons accused as a result of his investigations." *Id.* at 137, 75 S. Ct. at 625.

Three other cases cited by Whisenhant also involved criminal contempt proceedings in which the Court held that a judge other than the one reviled by a contemnor should decide the contempt issue. In *Offutt v. United States,* 348 U.S. 11, 12, 75 S. Ct. 11, 12, 99 L. Ed. 11 (1954), a trial judge repeatedly clashed with defense counsel throughout a 14-day trial, ending in a finding of criminal contempt against trial counsel, which the Supreme Court reversed. In concluding that the trial judge was biased and not impartial, the Supreme Court emphasized that this was "not a rare flareup," but rather a "continuous wrangle on an unedifying level between the two." *Id.* at 17, 75 S. Ct. at 15. Likewise, in *Taylor v. Hayes,* 418 U.S. 488, 501, 94 S. Ct. 2697, 2705, 41 L. Ed. 2d 897 (1974), a running controversy between the trial judge and defense counsel escalated during a 10-day trial to the point that the trial judge's "mounting display of an unfavorable personal attitude toward petitioner, his ability, and his motives" had left personal stings on both sides. In contrast, the trial judge in *Mayberry v. Pennsylvania,* 400 U.S. 455, 465-66, 91 S. Ct. 499, 505, 27 L. Ed. 2d 532 (1971), was not "an activist seeking combat" like the judge in *Offutt* or *Taylor.* Nevertheless, the defendant's cruel slanders so vilified the trial judge that the judge "necessarily becomes embroiled in a running, bitter controversy," requiring a new judge to preside over a

contempt proceeding. *Mayberry,* 400 U.S. at 466, 91 S. Ct. at 505.

It is clear that the judicial bias cases cited by Whisenhant involve totally different facts from his own case. There is no evidence that Judge McRae was involved in a "running controversy" with Whisenhant or Whisenhant's attorneys. Neither side made personal attacks against the other, and Judge McRae never displayed an inappropriate or hostile attitude toward the defense. Moreover, the order granting Whisenhant's motion for funds benefitted the defense. The cover letter by Chris Galanos does not establish that Judge McRae was in cahoots with the prosecution, nor that he signed the order granting the motion for funds in order to protect against a potential *Ake* error in the 1981 trial. As the district court adroitly concluded,

> Under the circumstances, Whisenhant's accusations of a judicial/prosecutorial conspiracy in a smoke-filled backroom are not credible where the "conspiracy"'s object was an unremarkable order that gave the defense exactly what they wanted and made accurate observations about evidence available to the defense in earlier proceedings. Had a "conspiracy" truly been hatched, the [c]ourt suspects it would not have been used as a vehicle to grant a defense motion and make uncontroversial observations about evidence available in 1981. If Judge McRae and Galanos had *ex parte* dealings regarding the psychiatrist order, such interactions, without

> more, are in no way symptomatic of the kind of prejudice, hostility and antagonism required to support a finding of judicial bias.

R1-22 at 58 n.71. Based on a thorough review of the record, we conclude that the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. We therefore deny relief on this claim.

III. CONCLUSION

Whisenhant filed this appeal seeking federal habeas relief from his second conviction and third death sentence for the 1977 murder of Cheryl Payton. We hold that Whisenhant received effective assistance of counsel at his 1981 trial because trial counsel made a reasonable, strategic decision not to present evidence of insanity. In addition, the FBI profile reports and a co-worker's statement were not material to either the 1981 guilt phase trial, where no evidence of insanity was presented, or to the 1987 penalty phase trial, where abundant evidence of mental illness was presented. The prosecutor's closing argument that no co-worker had testified that Whisenhant was insane did not misstate the evidence and properly responded to the defense's closing argument. Finally, the trial judge did not evince bias or partiality against Whisenhant when it signed an order prior to the 1987 trial granting Whisenhant's motion for funds for a psychiatrist. As Whisenhant

is not entitled to relief on any of his claims, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

THOMAS WARREN WHISENHANT,	)	
Petitioner,	)	**CIVIL ACTION**
v.	)	**02-0397-WS-C**
MICHAEL HALEY,	)	
Respondent.	)	

AMENDED ORDER

This matter is before the Court on petitioner Thomas Warren Whisenhant's Amended and Corrected Petition for Writ of Habeas Corpus by a Person in State Custody (doc. 6) filed pursuant to 28 U.S.C. § 2254. Both parties have submitted extensive filings setting forth authority and argument with respect to the 14 grounds for habeas relief identified in the Petition, which is now ripe for consideration.

I. Background.

A. Factual History.[1]

On the evening of October 16, 1976, 24-year old Cheryl Lynn Payton was working alone at a Com-Pac convenience store in Theodore, Alabama. (Vol. 24, R. 181-82, 189-93.) That day petitioner Thomas Warren Whisenhant ("Whisenhant") attended his daughter's one-year old birthday party, before visiting the store to purchase gasoline. (Vol. 25, RRR. 66-67, 76, 91.) Later that evening, during a heavy downpour, he returned to the Com-Pac store and abducted Payton at gunpoint. (*Id.*, RRR. 28, 56, 77.) After forcing her into his pickup truck, Whisenhant proceeded to drive to a dirt road in Irvington. (*Id.*, RRR. 78.) There, Whisenhant raped Payton in the front seat of the truck, then led her into the woods at gunpoint and shot her once in the head, killing her. (*Id.*, RRR. 45, 61, 81-82.) Whisenhant left the scene and returned to his home, leaving Payton's partially nude body in the woods. (*Id.*, RRR. 83.)

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[1] As the underlying facts are undisputed, the narrative contained herein is drawn from the recitation of the facts in the Amended Petition as well as the respondent's Answer. With regard to the latter, however, the Court notes that record citations in the Answer routinely direct the Court to the incorrect volume number, as well as inaccurate pinpoint citations, for particular cited passages. By way of example, respondent repeatedly references Volume 25 as "Volume 7," resulting in needless confusion in respondent's submission and hampering the Court's efforts to locate cited testimony in the sprawling record, which comprises some 43 volumes and exceeds 8,000 pages.

The following day, Whisenhant walked from his home to the scene of the crime, and returned to the body briefly. (*Id.*, RRR. 84.) At that time, he was confronted by two people who asked him what he was doing there and told him to leave because they believed he was "night hunting." (Vol. 24, R. 205-06.) Whisenhant then walked back home, without disturbing Payton's body. (Vol. 25, RRR. 84.)

The next day, October 18, 1976, Whisenhant again returned to the woods where Payton's body was located, for the stated purpose of trying to get caught. (*Id.*, RRR. 23.) At that time, he moved the body approximately 60 feet with the intention of making it easier for others to find. (*Id.*, RRR. 79, 85.) He also mutilated the body, using a knife to cut the left breast and abdomen, as well as the vaginal area. (*Id.*, RRR. 32, 46-47, 55, 64-65, 80, 85.)[2] Within minutes after he moved the body, Mobile County Sheriff's Deputies investigating reports that a body had been seen at that location observed Whisenhant driving his white pick-up truck nearby. (Vol. 24, R. 222, 225-27; Vol. 25, R. 244.)[3] A high-speed chase ensued, with the

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[2] Jim Small, a criminalist with the State of Alabama, Department of Forensic Sciences, examined Payton's body at the location where it was discovered on October 18, 1976. (Vol. 25, RRR. 93-95.) Small observed a wound on top of the head, a circular cut to the left breast; and a cut to the lower abdomen. (*Id.*, RRR. 95-96.)

[3] These officers had been summoned by a witness who had found the body at its original location some 15 or 20 minutes earlier. (Vol. 24, R. 215-17, 226-27.) By the time the deputies

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deputies pursuing Whisenhant at speeds of 90-100 miles per hour. (Vol. 25, R. 248-51.) Whisenhant eventually abandoned his truck and retreated into the woods on foot. (*Id.*, R. 251.) His wife was brought to the scene to communicate with him via loud-speaker. (*Id.*, R. 254.) Upon hearing her voice, Whisenant [sic] yelled, "I've done everything they said I did," and indicated that the officers would have to kill him in order to capture him. (*Id.*, R. 254-55.)

After being taken into custody, Whisenhant confessed to the rape, killing and post-mortem mutilation of Payton. (Vol. 25, RRR. 24-91.) He also confessed to killing two other female convenience store clerks, one of whom he also admitted to mutilating, in the preceding 12 months. (*Id.*)[4]

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arrived on the scene, the body was no longer in the location where the witness had found it because Whisenhant had moved it in the interim. (*Id.*, R. 220-21; Vol. 25, R. 242-43.)

[4] More extensive treatment of the facts may be found at the Alabama appellate court's published opinion following Whisenhant's first capital murder conviction in this matter. *Whisenhant v. State*, 370 So.2d 1080, 1081-86 (Ala.Crim.App. 1979). In 1989, following his second capital murder conviction and third death sentence, the Alabama Supreme Court adopted the statement of facts set forth in the 1979 opinion as its own. *Ex parte Whisenhant*, 555 So.2d 235, 236-37 (Ala. 1989). The Alabama courts' recitations of fact are largely undisputed.

B. Procedural History.[5]

1. The 1977 Conviction and Sentence.

In August 1977, Whisenhant was tried before Circuit Judge Ferrill D. McRae in Jefferson County Circuit Court for the rape and murder of Payton.[6] That Whisenhant committed these acts as set forth above was not contested; however, the defense argued that he should be found not guilty by reason of insanity, and offered considerable expert and lay testimony to bolster that defense.[7] On August 9, 1977,

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[5] Whisenhant has been represented at all relevant times during these proceedings – from the first trial in the Payton slaying all the way through the present habeas corpus petition – by the Southern Poverty Law Center in Montgomery, Alabama. Lead defense counsel at the 1977, 1981 and 1987 trial proceedings was Morris Dees of that organization. Mr. Dees was a highly experienced criminal defense attorney who was well-versed in capital litigation, having represented approximately 314 of the roughly 50 death penalty defendants his organization had assisted in capital trials since 1970. (Vol. 38, at 191-93.) Dees and his organization even published manuals for capital defense lawyers on how to try capital cases. (*Id.*) Moreover, Whisenhant's present counsel of record, Mr. Cohen and Ms. Brownstein, were part of the defense team at the 1987 penalty phase trial. (Vol. 20, R. 11-12.)

[6] On a defense motion, Judge McRae had moved Whisenhant's trial from Mobile County to Jefferson County, Alabama because of extensive pretrial publicity and intense public interest relating to the case. (Vol. 2, at 250; Vol. 9, at 1701, 1704-05.)

[7] The defense strategy was made clear in opening statements, when defense counsel informed the jury that "[t]he issue in this case is not whether he killed Cheryl Payton. The issue in this case is whether he is insane, if whether you believe

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the jury returned a guilty verdict on the capital murder charge. Following a post-verdict sentencing hearing, on September 9, 1977, Judge McRae entered written findings as to several statutory aggravating factors, including findings that Whisenhant committed the capital felony while on parole from a federal sentence of imprisonment for a crime of violence,[8] that Whisenhant had raped Payton before killing her, that Whisenhant would likely kill again if he were returned to a free society, and that Payton's murder was especially heinous, atrocious or cruel. (Vol. 9, at 1745-47.) Judge McRae found no mitigating circumstances. (*Id.* at 1747-48.) Based on these determinations, the trial judge concluded that the aggravating circumstances far outweighed any mitigating circumstances any sentenced Whisenhant to death. (*Id.* at 1748-49.)

Whisenhant appealed his conviction and death sentence. On February 20, 1979, the Alabama Court

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the acts he did were crazy acts and if you believe in your common sense that he was insane." (Vol. 3, at 537-38.)

[8] Whisenhant had been convicted in federal court of assault with intent to murder in March 1966 after attacking a female service member with a metal ashtray on a military installation, as a result of which he had been sentenced to 20 years imprisonment. (Vol. 25, RRR. 110-11.) He was paroled for that offense in 1973, and remained on parole at the time of the Payton slaying. (*Id.*) The federal government's decision to parole Whisenhant, and subsequent lack of monitoring and treatment of him, were the subject of a federal civil suit brought by Payton's survivors against the United States. Whisenhant cooperated with the Payton family in that lawsuit.

of Criminal Appeals reversed his conviction on the grounds that the prosecutor had engaged in improper closing argument by suggesting that Whisenhant would be released from custody if he were found not guilty by reason of insanity, because a state hospital was "not going to take a sane man." *Whisenhant v. State*, 370 So.2d 1080, 1100 (Ala.Crim.App. 1979). The appellate court also reversed because there was a fatal variance between the indictment and the judgment. *Id.* at 1102.

2. The 1981 Conviction and Sentence.

After remand, Whisenhant was retried during the week of August 3, 1981 in Mobile County Circuit Court.[9] Defense counsel filed and zealously litigated a multitude of pretrial motions, including a motion to disqualify or recuse Judge McRae on grounds of bias, a motion for funds to employ psychiatrists, and a motion for funds for expert witnesses. (Vol. 13, R. 5-15.)[10] The motion for recusal was denied, the motion

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[9] A pretrial motion for change of venue on grounds of pretrial publicity was denied by Judge McRae. (Vol. 13, R. 5.) A renewed motion for change of venue was denied following the commencement of trial. (Vol. 12, at 92.)

[10] As grounds for the motion to disqualify, defense counsel asserted Judge McRae's written findings after the 1977 trial proved that he "has a pre judgment that death is the appropriate punishment in this case," such that "it is reasonable for members of the public ... to question the judge's impartiality." (Vol. 12, at 19.) The motion for funds to employ psychiatrists alleged that Whisenhant was indigent and that he

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for funds for a psychiatrist was denied, and the motion for expert funds was granted only in the amount of $500.00. (*Id.*)[11] In denying the motion for recusal, Judge McRae stated that a judge's mere act of entering a ruling in a prior case is insufficient to require recusal. (Vol. 13, R. 5-6.) In limiting the expert funds to $500, the trial judge relied on an Alabama statute, pointed out that defense counsel was employed by the Southern Poverty Law Center (which had ample resources to retain experts), and noted that experts did testify for Whisenhant at the previous trial. (*Id.* at R. 7-9.)[12]

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required funds to employ two prominent psychiatrists who had testified and/or provided reports in connection with the 1977 trial, but who purportedly would not assist in the retrial without compensation. (*Id.* at 11-12.) The motion for funds for expert witnesses alleged that defendant was indigent and that he required the assistance of various expert witnesses at trial, including a criminologist, a serologist, a hair analyst, a public opinion pollster, a psychologist and educational testing specialist, and a parole and probation expert. (*Id.* at 42-46.) A renewed motion for funds to employ psychiatrists was filed in open court on August 6, 1981, and was denied the same day. (*Id.* at 97-100; Vol. 15, R. 585-86.)

[11] Defense counsel did not use the granted funds to retain a psychiatrist, but instead hired a serologist in a futile effort to show that Payton had not been raped. (Vol. 38, at 223-24.) By petitioner's admission, his counsel "wasted the funds" to avoid curing what was perceived to be an error by the trial court in denying funds for a psychiatrist. (Petitioner's Brief, at 99.)

[12] At the September 10, 1981 sentencing hearing conducted without a jury, the State called Dr. Claude L. Brown, a defense psychiatrist who had testified in the 1977 trial, to the stand. Dr. Brown acknowledged testifying for Whisenhant in the 1977 trial

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During jury selection on August 3, 1981, the trial judge and counsel inquired of prospective jurors as to their knowledge of the case.[13] In response to questioning, a number of panel members acknowledged awareness of the 1977 verdict. (Vol. 13, R. 58, 89, 127, 180, 182; Vol. 14, R. 213, 238, 240, 253, 264.) Judge McRae overruled defense counsel's objection that

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and stated that his opinion as to Whisenhant's mental health at the time of the offense had not materially changed since his 1977 trial testimony. (Vol. 16, R. 729.) Dr. Brown further testified that the defense had neither called him to testify nor subpoenaed him at the 1981 trial. (*Id.*) Had the defense subpoenaed him, Dr. Brown stated, he would have testified just as he did in 1977, even if he were never paid for that testimony. (*Id.*, R. 730.) Dr. Brown's 1977 expert testimony on Whisenhant's behalf was admitted into evidence at the September 1981 sentencing hearing. Defense counsel were given the opportunity to adduce testimony from Dr. Brown at the sentencing hearing relating to aggravating circumstances. (*Id.*, R. 731-32.) After initially resting on the 1977 transcript, defense counsel proceeded to question Dr. Brown regarding aggravating circumstances. (*Id.*, R. 732-38.)

[13] As is customary in capital trials, prospective jurors were "death-qualified" through question regarding whether they would be willing to impose the death penalty if the evidence warranted it. Several venire members who voiced opposition to capital punishment were struck for cause on that basis. During the lunch break, defense counsel objected that "all of the jurors that have thus been excused for their opposition to capital punishment have been black. The jury panel is now nowhere representative of a fair trial section of the community." (Vol. 13, R. 101.) On that basis, defense counsel requested that the entire panel be stricken and a new one instituted. That request was denied. (*Id.*) After another black venire member was excused for opposition to capital punishment, defense counsel renewed their objection for the record. (Vol. 14, R. 214.)

jurors who knew the first verdict were automatically disqualified from service, reasoning that the pertinent question was not whether jurors knew of the prior conviction but whether they were biased or prejudiced in some way. (Vol. 13, R. 58.) At the close of voir dire, defense counsel moved to strike each panel where one or more persons said they knew the verdict of the last trial. (Vol. 14, R. 296.) Judge McRae denied the motion. (*Id.*)

The guilt phase of the trial commenced on August 5, 1981. The retrial was of much shorter duration than its predecessor because neither side offered psychiatric testimony as to Whisenhant's sanity or insanity at the time of the offense. After the State rested, the defense renewed its motion for funds to employ a psychiatrist. (Vol. 16, R. 585-86.) When that motion was denied, the defense rested on the evidence already presented. (*Id.*, R. 586.) During closing arguments, the State emphasized that the defense had put on no evidence in support of Whisenhant's insanity defense. The State also theorized, over objection, that the defense failed to put on expert or lay testimony that Whisenhant was insane because "they couldn't find anybody to say it." (*Id.*, R. 594, 618-19.)[14] In its closing argument, the

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[14] Indeed, the prosecution argued to the jury as follows: "If these three fine criminal defense lawyers had found any doctor, any friend, any co-worker, anyone that knew the Defendant and they said he is insane, don't you think you would have heard from them? You haven't heard a word. . . . What medical testimony have they shown me. What neighbors have they

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defense acknowledged that no psychiatrist had testified as to Whisenhant's sanity, but also stressed that there were "lots of facts" in evidence from which he could be adjudged not guilty by reason of insanity. (Vol. 16, R. 602-11.) The jury began deliberating at 5:00 p.m. on August 6, 1981, and returned 25 minutes later with a guilty verdict on the capital felony count. (*Id.*, R. 644-45.)

Pursuant to the bifurcated procedure for capital cases under Alabama law, the penalty phase of Whisenhant's trial proceeded the next day. The State called a federal probation officer to testify as to Whisenhant's 1966 federal conviction, then rested. (*Id.*, R. 659, 681.) The defense rested without offering any evidence. (*Id.*, R. 683.) On the afternoon of August 7, 1981, the jury returned with a unanimous verdict, recommending a punishment of death. (*Id.*, R. 722.) After a subsequent hearing on September 10, 1981, Judge McRae once again determined that the aggravating circumstances far outweighed the mitigating circumstances, and sentenced Whisenhant to death. (*Id.*, R. 752-53.)

In July 1982, Whisenhant appealed his conviction and sentence. On appeal, he identified the following assignments of error (1) denial of motion for funds to employ psychiatrists; (2) exclusion of

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shown, what friends, what co-workers did they walk in here to tell me this man is insane, that this man has a diseased mind?" (*Id.*, R. 618-19.)

prospective jurors for opposition to capital punishment; (3) failure to strike prospective jurors who were aware of Whisenhant's 1977 conviction for this offense, several of whom served on the jury; (4) improper closing argument, where the prosecution told the jury in the penalty phase that "there is only one way, only one way, you can assure that this man is in jail for the rest of his life. Put him on death row"; (5) prosecutorial misconduct in opening statement in penalty phase based on State's remarks concerning other crimes committed by Whisenhant, when no evidence of those crimes was ever presented; (6) refusal to give requested jury instructions (including defense charges #12 and #14) at penalty phase; (7) Judge McRae's refusal to recuse himself; (8) use of non-statutory aggravating circumstance to support imposition of death sentence; (9) death qualification of jury; (10) constitutional challenge to Alabama's death penalty statute; and (11) failure of jury to elucidate their findings as to particular aggravating and mitigating circumstances. (Vol. 17, R-5.)

The Alabama Court of Criminal Appeals rejected all of Whisenant's [sic] assignments of error except for that concerning improper opening statement by the State in the penalty phase. *Whisenhant v. State*, 482 So.2d 1225 (Ala.Crim.App. 1982).[15] In particular, the

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[15] Whisenhant appealed the intermediate court's denial of his other grounds for relief. In July 1983, the Alabama Supreme Court affirmed the opinion of the Alabama Court of Criminal

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appellate court found that it was error for the prosecution to tell the jury in its opening statement that Whisenhant "robbed a blind black lady," "purse snatched" and was involved in "another homicide in Prichard, Alabama" prior to 1965. *Id.* at 1239. Because no evidence was adduced at any phase of trial regarding these events, and because the jury was not instructed to disregard the State's comments, the appellate court found that "the penalty phase of appellant's trial was impermissibly prejudiced by the prosecutor's remarks," and remanded for a new penalty phase trial. *Id.* The underlying conviction was affirmed. *Id.* at 1240. After additional appellate review, the Alabama Supreme Court declared in June 1984 that the State's improper opening statement was not harmless error, and reversed Whisenhant's sentence. *Ex parte Whisenhant*, 482 So.2d 1247 (Ala. 1984).

3. The 1987 Penalty Phase Proceeding.

A third penalty phase jury proceeding was conducted before Judge McRae in Mobile, Alabama in February 1987. Prior to trial, the defense again unleashed a battery of motions, including a motion to recuse or disqualify Judge McRae,[16] a motion for

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Appeals as to each rejected ground for appeal. *Ex parte Whisenhant*, 482 So.2d 1241, 1244-45 (Ala. 1983).

[16] This motion followed from the premise that Judge McRae "had a prejudgment that death is the appropriate punishment in this case" based on his having sentenced Whisenhant to death in

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access to a psychiatrist, a motion for change of venue on grounds of pretrial publicity, a motion to exclude jurors who knew of the prior death sentence, and a motion for funds for a psychiatrist as authorized by *Ake v. Oklahoma*. (Vol. 19, at 33-38, 42-45, 97-98, 107-10, 114-17.) Following oral argument, the motions to recuse, to change venue and to exclude jurors with knowledge of the prior death sentence were denied;[17] the motion for access to a psychiatrist was granted in

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the 1977 and 1981 trials. (Vol. 19, at 107-10.) At oral argument, Judge McRae stated that the motion was "[a]bsolutely denied" because "there's absolutely no legal ground for me to recuse myself." (Vol. 20, R. 71.)

[17] In denying the motion to exclude jurors, Judge McRae explained that it would be an "absolute . . . impossibility" to empanel a jury without knowledge of Whisenhant's previous death sentence given the extensive publicity the case had received over the years. (Vol. 20, R. 87.) He opined that this problem would be encountered anywhere in Alabama that the trial might be held. (*Id.*, R. 14.) Rather than excluding venire members with knowledge of the prior proceedings, the trial judge indicated that he would "qualify[] this jury very generally on publicity" by inquiring as to whether members of the panel felt they could be fair and impartial despite awareness of pretrial publicity. (*Id.*, R. 88-89.) On the day of jury selection, Judge McRae announced that the venire would be qualified immediately on publicity, and the panel members who had knowledge about the previous trials would be questioned individually as to knowledge of the prior sentence. (Vol. 21, R. 120.) If a venire of 40 untainted individuals could not be found, Judge McRae indicated that he would grant a change of venue. (*Id.*)

part; and the motion for *Ake* funding was granted. (*Id.* at 39, 46, 99, 111, 118.)[18]

With regard to the motion for a psychiatrist, Judge McRae entered a written order on February 5, 1987, stating in part as follows:

> "Defendant presented abundant psychiatric evidence at the first trial and the same evidence was available to him at the second trial and is still available to him. Had he desired to do so, Defendant could have read the psychiatric testimony from the first trial into the record before the jury at the second trial, and he could do so now. The Defendant also could have subpoenaed at least one of his expert psychiatric witnesses to present live testimony at his second trial, and he can do so now.
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> "[T]he Court is convinced that the non-profit law center [representing Whisenhant] could easily fund any and all psychiatric assistance that Defendant and his counsel thought necessary. The failure to do so at the second

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[18] During oral argument on the pretrial motions, Judge McRae stated to defense counsel as follows: "Mr. Dees, you and I both have tried this case a number of times. . . . The victim in this case, as I recall the evidence, was abducted with Entebbe precision and he certainly has to – you know, which an irrational person I do not believe could have formed." (Vol. 20, R. 96.) Based on those remarks, defense counsel renewed its motion for recusal, which Judge McRae again denied. (*Id.*, R. 96-97.)

> trial, and the professed unwillingness to do so now, can only be part of a litigation tactic."

(Vol. 19, at 39-40.)[19] Notwithstanding these findings, Judge McRae granted the defense motion in part by authorizing Whisenhant to spend up to $2,200 in state funds "to hire an independent psychiatric expert to assist the Defendant in any way he and his counsel see fit." (*Id.* at 40.)

During the jury selection conducted on February 17-19, 1987, venire members who professed to have heard any publicity or otherwise to have knowledge about the case were questioned individually. Judge McRae asked the first venire panel if they had "seen anything about this case on television, read anything about this case in the newspaper or seen or heard anything about this case on television and, if so, please stand." (Vol. 21, R. 206.)[20] Approximately 33

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[19] This order and the circumstances under which it was prepared and signed subsequently became the basis for a successful defense motion to recuse Judge McRae during the Rule 32 proceedings, and form the foundation of Whisenhant's current contention that he is entitled to habeas relief on the ground of judicial bias.

[20] Once the venire members who had been exposed to pretrial publicity stood, the trial judge inquired, "[I]s there any member of this jury who thinks because of the recollection that you have about this case, whether it be from the radio, television or newspaper, that it [would] be impossible for you to sit as a fair and impartial juror in this penalty stage of this particular case? That is, what you have read, what you have seen or seen and heard on television, would that in any way bias or affect you in any way from rendering a fair and impartial verdict in this

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jurors rose. (*Id.*, R. 207-12.) For the approximately 18 venire members who stood and were not otherwise disqualified, Judge McRae called them back one by one for follow-up questioning as to whether they recalled what sentence had been imposed. (Vol. 21, R. 246-64.)[21] In several instances, defense counsel requested and received permission to ask follow-up questions to verify the extent of the venire members' knowledge. (*Id.*) Defense counsel challenged for cause all venire members who had knowledge that Whisenhant had previously been sentenced to death. (*Id.*) Judge McRae granted those challenges. (*Id.*) At the urging of the State, Judge McRae then asked the remaining venire members as a group whether any of them "heard anything about this case from the news media or any other source that might in any way prevent or impair you from deciding this case based solely on the law . . . and the evidence." (*Id.*, R. 274-75.) Again, the record does not reflect that any panel member responded affirmatively.[22]

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case." (Vol. 21, R. 207.) The record does not reflect that *any* panel member responded affirmatively by raising his or her hand.

[21] When consulted regarding this portion of voir dire, defense counsel demurred, stating "I'm just going to let the Judge handle this part." (Vol. 21, R. 247.)

[22] The following morning, defense counsel requested permission "to inquire of the jurors by questions calculated to elicit the disclosure of the existence of actual prejudice, the degree to which the jurors had been exposed to prejudicial publicity . . . and how such exposure has affected the jurors' attitude toward the trial." (Vol. 22, R. 399) Judge McRae

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This process was repeated with the second venire panel numbering 71 prospective jurors. To that group, the trial judge asked them to stand if they "know something about this case from what you have read in the newspaper, what you have seen and heard on television, or what you may have heard on the radio . . . or any other way that you may have learned something about the facts of this particular case." (Vol. 22, R. 388.) As to the standing venire members, Judge McRae asked whether any of them, because of their knowledge about the case, "could not possibly sit as a fair and impartial juror." (*Id.*) Four jurors raised

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responded, "We've done that." (*Id.*) During a vigorous, protracted oral argument on the motion, the trial court confirmed that defense counsel was free to ask any question on pre-trial publicity that he wished to ask. (*Id.*, R. 406.) Judge McRae denied defense counsel's request to re-call the previous day's panel to ask additional questions on pretrial publicity, as counsel had never been precluded from posing such questions the previous day. (*Id.*, R. 407.) Defense counsel's requests to examine each juror regarding all aspects of pretrial publicity in an individually sequestered setting were denied, but the trial court reiterated that defense counsel could ask the smaller panels anything he wished regarding pretrial publicity. (*Id.*, R. 412-13.) The trial court did, however, agree to ask each juror individually to state everything he or she had heard about the case. (*Id.*, R. 413-14.) Later that same day, defense counsel renewed its motion to re-call the previous day's panel for further questioning regarding pretrial publicity. (Vol. 23, R. 526.) Judge McRae granted that request; thus, those jurors were re-called one by one to allow defense counsel to inquire as to their knowledge of pretrial publicity. (*Id.*, R. 568-69, 573.) Defense counsel fully availed itself of that opportunity. (*Id.*, R. 569-640.) At least two venire members were struck for cause based on such follow-up questioning. (*Id.*, R. 612, 640.)

their hands in response, and were successfully challenged for cause. (*Id.*, R. 389-90.) The remaining venire members returned the next day, where they were again asked to stand if they "have learned anything about this case from the news media, radio, television, the newspaper or, for that matter, from your neighbors, friends, anybody." (*Id.*, R. 431.) Those venire members who stood were subsequently questioned one-by-one in the jury room. In particular, they were subjected to questioning by the trial court and by counsel for both sides as to whether they knew what sentence had been imposed previously and what they knew about the case. (*Id.*, R. 445 32, 495-500; Vol. 23, R. 501-66.) Panel members who knew of the 1981 sentence were dismissed for cause, even if they merely thought or believed it was a death sentence. (Vol. 22, R. 454; Vol. 23, R. 508, 533.)

After more than two days of extensive voir dire spanning several volumes in the record, the jury selection process was completed and a jury was empaneled after lunch on February 19, 1987. (Vol. 23, R. 138.)[23] The trial commenced that afternoon and proceeded through February 20, 21, and 23. In its case in chief the State put on testimony from nine lay witnesses who testified to the facts underlying the offense. On the afternoon of February 20, the State rested. (Vol. 25, RRR. 128.) The defense proceeded to

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[23] The demographics of the empaneled jury were four blacks and eight whites, five females and seven males. (Vol. 29, RRR. 813.)

call nine lay and expert witnesses on February 20 and 21, testifying as to Whisenhant's mental state and other potential mitigating and aggravating circumstances After calling five rebuttal witnesses on February 21 and 23, the State rested for the last time. (Vol. 28, RRR. 655.)

During the charge conference, defense counsel requested 11 separate charges. Among those charges was Requested Charge #10, which would have instructed jurors that in addition to the statutory mitigating circumstances, "you may also consider as a mitigating circumstance any aspect of the defendant's character and life and any of the circumstances of the offense that tend to indicate that the defendant should not be sentenced to death." (Vol. 19, at 157.) This requested charge enumerated five non-statutory mitigating factors, including Whisenhant's psychological and emotional problems at the time of the offense, his tumultuous family history, his post-conviction assistance to law enforcement, his post-conviction aid to the victim's family, and his good adjustment to life in prison. (*Id.*) This charge was refused on the ground that the concept behind Charge #10 was adequately encompassed by the general charge. (Vol. 19, at 157; Vol. 28, R. 682.) Ultimately, Judge McRae instructed the jury on the statutory mitigators of extreme mental or emotional disturbance and impairment of capacity to appreciate criminality of conduct or to conform conduct to the requirements of law. (Vol. 29, RRR.786-87.) After discussing statutory mitigating circumstances, he instructed as follows:

> "In addition to the mitigating circumstances I have just read to you, you may also consider as a mitigating circumstance, any aspect of the Defendant's character and life, and any of the circumstances of the capital offense which tend to indicate that the Defendant should not be sentenced to death. This includes, but is not [limited] to, anything that happened to the Defendant before he committed the capital offense that indicates or tends to indicate that he should not be sentenced to death. Mitigating circumstances also include, but are not limited to, any conduct or behavior of the Defendant since the time of the capital offense which indicates or tends to indicate that he should not be sentenced to death. Mitigating circumstances also include, but are not limited to, any aspect of the Defendant's mental or emotional condition at the time of the crime which indicates or tends to indicate that the Defendant should be sentenced to life imprisonment without parole instead of death. A mitigating circumstance[ ] does not have to be included in the list which I have read to you in order for it to be considered by you."

(*Id.*, RRR. 787-88.)[24]

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[24] At the conclusion of the charge, Judge McRae re-read certain portions of the charge to the jury upon being informed that he had misspoken in several places. Among the sections he re-read were the entire second, third and fourth sentences of the

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At 6:48 p.m. on February 23, 1987, the jury began its deliberations, but soon retired for the evening without a verdict (*Id.*, RRR. 803.) After approximately five hours of deliberations the next day, the jury returned a unanimous verdict fixing Whisenhant's punishment at death by electrocution. (*Id.* RRR. 809.) A sentencing hearing before Judge McRae was held on April 2 and 23, 1987. He noted that during the February 1987 trial, "the defense presented psychiatric testimony and evidence which it did not present at the guilt stage trial five and a half years earlier. This Court concludes that even considering that additional psychiatric testimony and evidence, the defense has still failed to establish the not guilty by reason of insanity defense." (*Id.*, RRR. 928.)[25]

The trial court found that four statutory aggravating circumstances had been proven beyond a reasonable doubt and to a moral certainty, including the following: (1) commission of offense while under a sentence of imprisonment; (2) previous convictions of three crimes of violence to a person; (3) rape of a victim during a capital offense; and (4) the offense was particularly heinous, atrocious and cruel. (*Id.*,

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above-quoted passage. (Vol. 29, RRR. 801.) Thus, the jury was instructed as to non-statutory mitigating circumstances not once, but twice, in substantively identical terms.

[25] The sentence findings and order that Judge McRae read into the record on April 23, 1987 are memorialized in a written order entered that day. (Vol. 19, at 168-76.)

RRR. 928-30.) With regard to mitigating circumstances, Judge McRae found that the offense was not committed "under the influence of extreme mental or emotional disturbance," inasmuch as Whisenhant's mental or emotional disturbance was not extreme. (*Id.*, RRR. 931.) This disturbance was, however, expressly considered as a non-statutory mitigating circumstance. (*Id.*, RRR. 931-32.) The trial court also rejected the statutory mitigating circumstance of substantial impairment of Whisenhant's capacity to appreciate the criminality of his conduct or to conform his conduct to law, as being unsupported by the evidence. (*Id.*, RRR. 932.) Judge McRae expressly considered and weighed every non-statutory mitigating circumstance identified by defense counsel, including Whisenhant's personality disorders, the unhappy circumstances of his childhood, his good adjustment to prison, his cooperation with the victim's family and the government, and every aspect of his character, his record and the circumstances of his crime that might militate in favor of a sentence other than death. (*Id.*, RRR. 932-36.) Upon weighing the aggravating and mitigating circumstances, Judge McRae concluded that "the four aggravating circumstances that exist in this case far outweigh all the mitigating circumstances and . . . the proper sentence is death. Indeed, the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt and to a moral certainty." (*Id.*, RRR. 936.)

Defense counsel filed a motion for new trial predicated largely on a *Brady v. Maryland* argument that the State had withheld exculpatory evidence regarding a prosecution expert witness who testified at the 1987 trial. (Vol. 20, at 289-90.)[26] On May 5, 1987, Judge McRae denied the motion, finding beyond a reasonable doubt that disclosure of the evidence would not have changed the result of the sentencing proceeding. (*Id.* at 291-99.)

In July 1988, Whisenhant appealed his sentence to the Alabama Court of Criminal Appeals on seven grounds, including the following: (1) Judge McRae's refusal to recuse himself; (2) denial of defense motions for change of venue; (3) prosecutorial misconduct in the form of a pretrial press conference by the Alabama Attorney General, which was alleged to have poisoned the venue against Whisenhant; (4) exclusion of prospective juror Karen Steadham based on her inability to impose the death penalty; (5) improper closing argument by the State, in which the prosecutor stated that Whisenhant's appeals were not exhausted; (6) refusal to give defendant's requested jury charge #10 relating to nonstatutory mitigating circumstances; and (7) testimony of the victim's mother during the sentencing hearing. (Vol. 33, R-25.)

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[26] This evidence related to a DUI charge brought against the expert in Mobile County and the plea bargain of those charges to a lesser offense. The defense maintained that this evidence showed that the expert had received special favors in exchange for his testimony.

On August 23, 1988, the Alabama Court of Criminal Appeals affirmed the sentence. *Whisenhant v. State*, 555 So.2d 219 (Ala.Crim.App. 1988). After Whisenhant's subsequent application for rehearing was denied, he appealed to the Supreme Court of Alabama, which likewise affirmed the sentence. *Ex parte Whisenhant*, 555 So.2d 235 (Ala. 1989). The United States Supreme Court denied Whisenhant's petition for writ of certiorari. *Whisenhant v. Alabama*, 496 U.S. 943, 110 S.Ct. 3230, 110 L.Ed.2d 676 (1990).

4. State Court Post-Conviction Proceedings.

Whisenhant then commenced post conviction proceedings in Alabama state courts, filing a Rule 32 petition in the Circuit Court of Mobile County on December 14, 1990. (Vol. 35, at 31-52.) During discovery, the defense identified several additional claims and amended the petition on three occasions – in January 1995, September 1996, and October 1996 – to assert a *Brady* claim for suppression of documents, a juror misconduct claim, and a claim of judicial bias based on newly discovered evidence. (Vol. 35, at 162; Vol. 36, at 287, 306.)[27]

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[27] The *Brady* claim identified two 1976 FBI "psychological profile" reports that purportedly would have bolstered Whisenhant's claims of insanity or extreme mental or emotional disturbance, as well as an October 1976 statement from Sandra Heverly, one of Whisenhant's co-workers whom he had dated briefly, that he was "weird." Whisenhant objected that neither the FBI reports nor the Heverly statement were disclosed to the

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Contemporaneous with the final amendment, defense counsel moved for Judge McRae (the presiding judge over the Rule 32 proceedings) to recuse himself because his impartiality might reasonably be questioned. The defense contended that on the eve of the Rule 32 hearing, they had discovered documentation showing that on February 4, 1987, prosecutor Chris Galanos had *ex parte* dealings with Judge McRae. In particular, records showed that Galanos had submitted a proposed order regarding a defense request for access to a psychiatrist, along with a note suggesting that the proposed order was designed to foreclose a finding of error in the 1981 guilt phase proceedings. (Vol. 36, at 309.)[28]

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defense until the discovery period of the Rule 32 proceedings. As for the juror misconduct claim, Whisenhant maintained that one of the 1987 sentencing phase jurors had lied during voir dire by failing to disclose that her aunt had been hospitalized for psychological problems.

[28] The note itself was a handwritten document dated "2/4", reading as follows:

> "Judge:
>
> "Attached are two proposed orders in *Whisenhant* drafted by Carnes for your consideration. The one relating to access to a psychiatrist enumerates facts intended to preclude *Ake* error during the guilt stage, but I am not sufficiently familiar with the facts to determine the accuracy of the order. Let me know what you want to do.
>
> Chris"

(Vol. 36, at 314.)

Neither the note nor the proposed order were shared with defense counsel in February 1987, and Judge McRae had signed a document substantially similar to the proposed order the next day. (*Id.* at 310.)[29] Upon review of the motion, Judge McRae promptly recused himself from the post-conviction proceedings "out of an abundance of caution and to avoid all appearance of impropriety" and "despite the fact that there is no legal justification for recusal." (*Id.* at 319.) Thereafter, Judge Braxton Kittrell presided over the Rule 32 proceedings in Mobile County Circuit Court.

In its final form, Whisenhant's petition for post-conviction relief in state court included the following 13 assignments of error: (1) the State's failure to disclose *Brady* evidence; (2) alleged racially discriminatory use of peremptory challenges by the State to strike black jurors in the 1981 and 1987 trials; (3) juror misconduct at the 1987 penalty phase; (4) Judge McRae's failure to excuse or question jurors who stated it was impossible for them to be impartial during the 1987 jury selection; (5) Judge McRae's refusal to change venue or permit meaningful voir

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[29] The Rule 32 trial court rejected Whisenhant's claim that the trial judge "adopted the prosecution's order in a wholesale fashion." (Vol. 36, at 310.) Indeed, the Rule 32 trial judge correctly pointed out that Judge McRae "changed the format of the draft order and changed the amount of money that was stated in the draft order." (Vol. 37, at 424-25.) Nonetheless, the order signed by Judge McRae on February 5 was substantially similar to the *ex parte* document submitted by the prosecution on February 4.

dire during the 1987 proceedings; (6) improper closing argument by the State at the 1981 guilt phase trial; (7) improper jury instruction regarding wilfulness at the 1981 guilt phase trial; (8) improper closing argument by the State at the 1987 trial; (9) improper jury instructions during the 1987 trial regarding "moral certainty" and the burden of proof; (10) improper testimony by State psychiatric witnesses at the 1987 trial; (11) death by electrocution as cruel and unusual punishment (12) ineffective assistance of counsel during the 1981 guilt phase trial, the 1987 sentencing phase trial and on appeal, including 14 separate alleged defects in counsel's performance;[30] and (13) judicial bias at the 1987 proceeding. (Vol. 36, R. 287-306.)

After a Rule 32 hearing conducted on October 24, 1996, Judge Kittrell denied the petition in its entirety in an 86-page order entered on March 3, 1998. (Vol.

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[30] The posture of the ineffective assistance claims was unusual, to say the least, given that the Southern Poverty Law Center represented Whisenhant both during the Rule 32 proceedings and in the underlying proceedings at which the alleged ineffective assistance occurred. Lead defense counsel in the Rule 32 action, Richard Cohen (who is also lead defense counsel in the instant § 2254 petition), was a key member of the defense team at the 1987 trial. As such, defense counsel essentially argued that their own representation of Whisenhant fell short of minimum constitutional standards for attorney competence. This selfless characterization of their own work as incompetent is illustrative of the extraordinary measures taken by Whisenhant's counsel in an effort to overturn his death sentence.

37, R. 403-89.) The Alabama Court of Criminal Appeals entered an unpublished Memorandum affirming the denial of the Rule 32 petition on November 27, 2000. (Vol. 42, R-44.) On June 1, 2001, the Alabama Supreme Court denied Whisenhant's petition for a writ of certiorari. (Vol. 43, R-49.)

5. Section 2254 Petition.

Having exhausted state court post-conviction remedies, Whisenhant filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 in this District Court on May 30, 2002 (the very last day of the one-year period authorized by the AEDPA), which he subsequently amended on September 5, 2002. As amended, Whisenhant's § 2254 petition (the "Petition") identifies some 14 grounds for relief, including the following: (1) *Ake* error arising from denial of funds to employ psychiatrists before the 1981 trial; (2) *Brady* violations; (3) trial court's refusal to strike jurors during 1981 jury selection who had knowledge of outcome of 1977 trial; (4) prosecutorial misconduct in closing argument of 1981 guilt phase trial by arguing that Whisenhant's failure to adduce testimony of insanity was proof of his sanity; (5) improper jury instructions at 1981 guilt phase trial; (6) *Batson* error arising from racially discriminatory peremptory strikes by the State in 1981 and 1987 proceedings; (7) judicial bias during the 1987 penalty phase trial; (8) juror misconduct at 1987 trial; (9) partiality among jurors at 1987 trial; (10) refusal to allow voir dire to adduce evidence of actual juror prejudice at 1987 trial;

(11) refusal to give requested jury instruction regarding non-statutory mitigating circumstances at 1987 trial; (12) improper testimony of victim's mother at 1987 sentencing hearing; (13) ineffective assistance of counsel at trial and on appeal in six respects; and (14) *Ring* error.

At the directive of Chief Judge Granade, to whom this case was originally assigned,[31] the parties submitted detailed briefing (docs. 7, 10) regarding the threshold issue of the impact of the Supreme Court's 2002 decision in *Ring v. Arizona* on the Petition. Respondent filed a 45-page Answer (doc. 9) to the Petition on January 5, 2003. With leave of Court, Whisenhant proceeded to file a 140-page brief (doc. 18) in support of his Petition on August 18, 2003. The Petition having been exhaustively briefed, it is now ripe for review and consideration.

II. Standard of Review.

Whisenhant's petition for habeas corpus was filed on May 30, 2002, well after the effective date of the Antiterrorism and Effective Death Penalty Act of

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[31] In March 2003, the undersigned was elevated to the position of United States District Judge. At that time, numerous cases previously assigned to the other two active district judges in this district were reassigned to the undersigned in order to balance the workloads of the respective judicial officers. The instant action was among dozens transferred by Chief Judge Granade to the docket of the undersigned in the ordinary course of docket rebalancing in March 2003.

1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), 28 U.S.C. §§ 2241 *et seq.*[32] Under 28 U.S.C. § 2254(d), a federal court may not grant an application for writ of habeas corpus pursuant to the judgment of a state court with respect to any claim adjudicated on the merits by the state court unless the state decision (i) is either "contrary to" or an "unreasonable application of" clearly established Supreme Court precedent, or (ii) is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* § 2254(d); *Carr v. Schofield,* 364 F.3d 1246, 1250 (11th Cir. 2004); *Williams v. Taylor,* 529 U.S. 362, 391, 120 S.Ct. 1495, 1512, 146 L.Ed.2d 389 (2000). "For claims that have not been adjudicated on the merits in state court, and are otherwise validly before the federal court for review, the court can make its own determination of the merits." *McNair v. Campbell,* 307 F. Supp.2d 1277, 1293 (M.D. Ala. 2004) (citations omitted).[33]

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[32] AEDPA applies to federal habeas petitions filed after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 326-27, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Hence, there can be no reasonable dispute that Whisenhant's Petition is subject to AEDPA.

[33] The AEDPA standards are quite stringent. *See, e.g., Brown v. Crosby,* 249 F. Supp.2d 1285, 1289 (S.D. Fla. 2003) (pointing out that AEDPA significantly limits § 2254 review and provides for much greater deference to state court findings than was the case previously). Thus, in the § 2254 context, a state court's factual findings are presumed correct, and the applicant bears the burden of rebutting that presumption by clear and

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Of critical importance to the § 2254 analysis are notions of exhaustion and procedural default. As to the former, "[h]abeas petitioners generally cannot raise claims in federal court that were not first exhausted in state court." *See, e.g., Snowden v. Singletary,* 135 F.3d 732, 735 (11th Cir.1998). For exhaustion purposes, it is not sufficient "that a somewhat similar stage law claim was made." *Kelley v. Secretary for Dept. of Corrections,* 377 F.3d 1317, 1344-45 (11th Cir. 2004) (requiring that habeas petitioners present claims to the state courts in such a manner that a reasonable reader would understand the state court claim's particular legal basis and specific factual foundation).

As to the latter, "[a] state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." *Bailey v. Nagle,* 172 F.3d 1299, 1302 (11th Cir. 1999). Procedural default arises in the following circumstances: (1) where the state court correctly applies a procedural default principle of state law to conclude that a petitioner's federal claims are barred; or (2) if the petitioner simply never raised a claim in state court, and it is obvious that the unexhausted claim would now be barred in state court by a state-law

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convincing evidence. *See* § 2254(e)(1); *Putnam v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2001); *Harrell v. Butterworth,* 251 F.3d 926, 930-31 (11th Cir. 2001).

procedural default (*i.e.*, a bar against successive petitions). *Id.* at 1302-03. Thus, as to claims actually presented by Whisenhant to Alabama courts, this Court must inquire as to whether the last state court rendering judgment clearly and expressly stated that its judgment rested on a procedural bar, *i.e.*, an adequate and independent state ground. *Id.* at 1303. For claims that Whisenhant did not present to Alabama courts, the Court must ask whether any attempt he now made to raise them in state court would be futile under Alabama procedural default doctrine. *Id.* at 1303; *see also Snowden*, 135 F.3d at 736 (explaining that "when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping gong' and just treat those claims now barred by state law as no basis for federal habeas relief"). To escape application of the procedural default doctrine, a § 2254 petitioner must either show cause for the default and prejudice, or establish a fundamental miscarriage of justice. *See Turner v. Crosby,* 339 F.3d 1247, 1281 (11th Cir. 2003).

III. *Sua Sponte* Analysis of Recusal Issue.

Before turning to the merits of the Petition, in light of the gravity of this case, the Court will address the threshold question of whether it is appropriate for the undersigned to rule on Whisenhant's claims. The parties have not raised this issue in their filings; nonetheless, the Court considers this question *sua*

sponte to dispel any possible inference of partiality or impropriety.

The undersigned served as an Assistant and Chief Assistant District Attorney in Mobile County from 1981 through March 1987, under then-District Attorney Chris Galanos. Thus, the undersigned was affiliated with the Mobile County District Attorney's Office (the "D.A.'s Office") at the time of both the 1981 trial and the February 1987 penalty phase retrial of this matter. The record is clear that the D.A.'s Office had no involvement in Whisenhant's 1981 trial. (Vol. 37, Hearing Transcript, at 44)[34] Indeed, Galanos testified during the Rule 32 proceeding that he and his staff did not participate in the 1981 trial "[b]ecause the Attorney General of Alabama deemed it appropriate, for reasons known only to him, that his office would handle that case." (*Id.*)

However, the prosecution staffing of the 1987 trial differed from that of its predecessor. Pretrial proceedings reflect that the prosecution was again spearheaded by the Attorney General's Office, just as it had been in 1981. In January 1987, however, a month before trial, Galanos was appointed to the prosecution team. (Vol. 29, RRR. 905.)[35] Indeed, a

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[34] Review of the record of the 1981 trial proceedings confirms that the prosecution was handled exclusively by the Alabama Attorney General's Office in Montgomery, with no assistance from Galanos or anyone else at the D.A.'s Office.

[35] The eleventh-hour nature of Galanos's participation in the 1987 trial is confirmed by the fact that the Attorney

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newspaper article in the *Mobile Register* dated February 3, 1987 covered a press conference at which Alabama Attorney General Don Siegelman announced the appointment of both Galanos and special Assistant Attorney General Tom Sorrells to prosecute Whisenhant in the impending penalty phase trial. (Vol. 19, at 129.) As Galanos testified, then-Assistant Attorney General Ed Carnes was lead trial counsel for the State at the 1987 trial. (Vol. 37, Reporter's Transcript, at 47.) Notwithstanding Galanos's involvement in the prosecution, the litigation file for the case was retained and managed at all times by the Attorney General's Office in Montgomery, not the D.A.'s Office. (*Id.* at 48.) To be sure, pursuant to his appointment, Galanos actively and substantially assisted in the 1987 prosecution, including examination of witnesses and oral argument; however, no attorneys from the D.A.'s Office other than Galanos himself appeared as counsel of record in connection with the 1987 trial.

Prior to reviewing the briefs and transcripts in this case, the undersigned had no recollection of this case being in the D.A.'s Office during the undersigned's tenure there. The Court did not recall that the *Whisenhant* retrial happened while the undersigned worked in that office, much less that Galanos

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General's Office exclusively handled all pretrial hearings and motion practice – with no involvement or appearance by Galanos – as late as December 1986. (*See* Vol. 19, at 29-31; Vol. 20, R. 11 *et seq.*)

had been part of the prosecution team. Nonetheless, upon realizing that Whisenhant's 1987 trial occurred one month before the undersigned's departure from the D.A.'s Office and that Galanos assisted at trial, the Court deemed it prudent to investigate whether recusal might be warranted.[36] To be perfectly clear, the undersigned did not work on the *Whisenhant* file, did not consult with Galanos about it, and did not supervise others in the D.A.'s Office in any work they may have done in connection with this case.

Given these circumstances, it is clear that the Whisenhant trial in 1987 was several steps removed from the undersigned's position as Chief Assistant District Attorney. It was not a D.A.'s Office file. Galanos was specially appointed to the prosecution team by the Alabama Attorney General at the eleventh hour. The undersigned neither assisted in the prosecution nor supervised the efforts of any attorneys who did. The undersigned was not privy to information or strategy relating to the Whisenhant prosecution, Any connection between the 1987 trial and the undersigned was so attenuated and insubstantial as to be virtually nonexistent. Accordingly, after careful consideration of the underlying facts and

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[36] The decision to explore recusal *sua sponte* was reinforced by the fact that the undersigned's name surfaced in the jury selection transcripts at the 1987 trial. In particular, prospective jurors were read a list of all assistant district attorneys in Mobile, including the undersigned, during the initial qualification process. (Vol. 21, R. 201; Vol. 22, R. 386.)

the relevant legal and ethical considerations, the undersigned is of the opinion that his impartiality could not reasonably be questioned and that recusal is unnecessary. *See* 28 U.S.C. § 455(a) (judge shall disqualify himself from any proceeding in which his impartiality might reasonably be questioned); Compendium, § 3.3-3(b) (2003) (judge who formerly served as prosecutor should recuse from all cases involving matters with which the judge came in contact or bore responsibility as a prosecutor, but need not recuse from cases in which he did not participate); *United States v. Ruzzano,* 247 F.3d 688, 694-95 (7th Cir. 2001) (fact that a judge served as assistant prosecutor when prosecutor's office prosecuted defendant, without more, does not require recusal of judge in subsequent proceedings involving defendant); *Mangum v. Hargett,* 67 F.3d 80, 83 (5th Cir. 1995) (judge's position on prosecutor's staff when inmate pleaded guilty did not require recusal from inmate's subsequent habeas corpus petition, where judge was not personally involved in the guilty plea proceedings); *United States v. Di Pasquale,* 864 F.2d 271, 279 (3d Cir.1988) (recusal not required absent a specific showing that the judge was involved in the previous case); *United States v. Gipson,* 835 F.2d 1323, 1326 (10th Cir. 1988) (to require recusal, there must be a showing that judge actually participated as counsel in the prior proceeding).

For all of the foregoing reasons, the Court will not recuse itself *sua sponte*, but will proceed to address the merits of the Petition.

IV. Analysis of Petitioner's Claims.

As noted *supra,* Whisenhant has interposed fourteen distinct grounds in support of his Petition. The Court will consider them sequentially.

A. Denial of Motion for Funds to Retain Psychiatrists in 1981.

Whisenhant's first claim for § 2254 relief is that Judge McRae wrongfully denied his motion for funds to hire psychiatrists to provide expert testimony and assistance to the defense at the 1981 trial. (Petition, ¶ 20.) At the 1977 trial, the defense team was aided by two psychiatric experts, Dr. Claude L. Brown and Dr. Emmanuel Tanay, who evaluated Whisenhant and offered opinions as to his sanity at the time of the offense.[37] Dr. Brown testified at the 1977 trial that Whisenhant was insane when he killed Cheryl Payton, and Dr. Tanay furnished a written report that reached a similar conclusion. According to the Petition, the trial court's denial of Whisenhant's

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[37] Dr. Brown was a prominent Mobile psychiatrist who was a former president of both the Alabama branch of the American Psychiatric Association and the Mobile Medical Society. (Vol. 25, RRR. 149.) Before being retained by the defense, Dr. Brown served on the State Lunacy Commission that examined Whisenhant to determine his competency to stand trial, as well as his sanity at the time of the offense. (Vol. 38, at 204.) The total bill for Dr. Brown's efforts for the defense at the 1977 trial was between $800 and $1,000. (*Id.*) Meanwhile, Dr. Tanay was described by defense counsel as "one of the foremost forensic psychiatrists in America." (*Id.* at 214-15.)

motion for funds before the 1981 trial "effectively foreclos[ed] the presentation of petitioner's well-founded insanity defense." (Petition, ¶ 20.) Whisenhant ascribes error to this ruling under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

This assignment of error was raised by Whisenhant on direct appeal. In denying this claim, the Alabama Court of Criminal Appeals reasoned as follows: (i) the State had no duty to fund a private psychiatrist of Whisenhant's own choosing where he had been observed and examined by State psychiatrists who had found him competent; (ii) as Dr. Brown testified at a post-trial hearing, Whisenhant could have procured his testimony at the 1981 trial by subpoenaing him, but he chose not to do so; (iii) Whisenhant had full access to the testimony and reports of Drs. Brown and Tanay from the 1977 trial, based on their extensive evaluations and opinions rendered at that time; (iv) the trial court had granted Whisenhant $500 for use on any expert witness he saw fit; (v) the State did not offer any psychiatric testimony at the 1981 trial, so the defense did not require psychiatrists to rebut the State's experts; and (vi) Whisenhant failed to request other than specified private experts of his own choosing, to which he had no constitutional right. *Whisenhant v. State*, 482 So.2d 1225, 1229-30 (Ala.Crim.App. 1982). The Alabama Supreme Court affirmed this decision without comment

Ex parte Whisenhant, 482 So.2d 1241, 1244-45 (Ala. 1983). Whisenhant now renews his *Ake* claim.[38]

Under 28 U.S.C. § 2254(d), for Whisenhant to prevail on this claim, the Alabama courts' decision must have been "contrary to, or . . . an unreasonable application of, clearly established" Supreme Court precedent, or "based on an unreasonable determination of the facts in light of the evidence." *Id.* Whisenhant has failed to make the necessary showing.

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[38] The State objects to Whisenhant's *Ake* argument on a host of grounds, including nonretroactivity, denial on state-law grounds and procedural default. (Answer, at ¶ 28.) None of these threshold objections to this claim are meritorious. Regarding retroactivity, it is true that at least three circuits have stated, either as holdings or in *dicta,* that the *Ake* rule lacks retroactive effect. *See Gretzler v. Stewart,* 112 F.3d 992, 1000 (9th Cir. 1997); *Stewart v. Gramley,* 74 F.3d 132, 134 (7th Cir. 1996); *Bassette v. Thompson,* 915 F.2d 932, 938-39 (4th Cir. 1990); *but see Clisby v. Jones,* 960 F.2d 925, 928-29 n.6 (11th Cir. 1992) (declining to address retroactivity of *Ake*). The defect with the State's retroactivity argument is that *Ake* was decided on February 26, 1985, well before Whisenhant's conviction became final upon denial by the United States Supreme Court of his petition for writ of certioriari [sic] in 1990; therefore, a *Teague*-style retroactivity analysis is inapposite here. Furthermore, it is not apparent that Whisenhant's *Ake* argument was dismissed on exclusively state-law grounds, particularly where the Alabama court's analysis relied heavily on a decision from the Fourth Circuit. Finally, the record does not support the State's position that Whisenhant failed to exhaust state court remedies as to this claim. Therefore, the *Ake* claim must be decided on the merits.

In *Ake,* the Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." 470 U.S. at 74. In so ruling, the Court reasoned that where a State brings judicial power to bear through criminal proceedings against an indigent defendant, it "must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.* at 76. Where *Ake* applies, the key analytical steps are to determine (1) whether the defense timely requested expert assistance; (2) whether it was unreasonable for the trial court to deny that request; and (3) whether the denial rendered the trial fundamentally unfair. *See Conklin v. Schofield,* 366 F.3d 1191, 1206 (11th Cir. 2004); *Moore v. Kemp,* 809 F.2d 702, 710 (11th Cir.1987) (noting that the Supreme Court in *Ake* followed this three-part analytical approach). There is no reasonable question that Whisenhant requested funds for a psychiatrist in a timely manner before the 1981 trial; however, the second and third prongs are far more problematic for the defense.

With regard to the reasonableness of the denial of that request, the relevant inquiry is whether the trial judge should have concluded that denying expert funds would deprive Whisenhant of "an adequate opportunity to fairly confront the State's case and to present his defense." *Conklin*, 366 F.3d at 1208;

Moore, 809 F.2d at 710; *see also Hightower v. Schofield,* 365 F.3d 1008, 1015 (11th Cir. 2004). Whisenhant argues that the trial court knew that the insanity defense was the focal point of his defense and that deprivation of funds rendered him "unable to present his only defense at trial." (Petitioner's Brief at 10.) The fundamental flaw with this argument is that Whisenhant had consulted extensively with Drs. Brown and Tanay prior to the 1977 trial, and had secured trial testimony from Dr. Brown and detailed reports from both Dr. Tanay and Dr. Brown. Such reports and testimony were available for Whisenhant's use at the 1981 trial, irrespective of whether he obtained *additional* assistance from those experts in 1981. Additionally, the defense presented extensive non-expert evidence in support of the insanity defense at the 1977 trial, and there is no indication that such evidence was not available in 1981, regardless of whether Whisenhant received expert funding. It is therefore both misleading and incorrect for petitioner to insist that Judge McRae's ruling hamstrung his efforts to present his only defense in 1981. The trial court was well aware of the extensive cache of insanity evidence marshaled by Whisenhant in 1977, and relied on the availability of that evidence as a basis for denying the motion. (Vol. 13, at R. 7-9; *see also* Vol. 19, at 39-40)[39] Based on

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[39] As the trial court explained in an order entered during the 1987 proceedings, "Defendant presented abundant psychiatric evidence at the first trial and the same evidence was available to him at the second trial and is still available to him. Had he desired to do so, Defendant could have read the psychiatric

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these considerations, the Court cannot find that the trial judge was unreasonable in concluding that a lack of expert funding would deprive Whisenhant of an adequate opportunity to present his defense at the 1981 trial.[40]

The Petition fares no better with respect to the third *Ake* element, inquiring whether any error "had substantial and injurious effector influence in determining the jury's verdict." *Conklin*, 366 F.3d 1191,1206 (11th Cir. 2004) (quoting *Hicks v. Head*, 333 F.3d 1280, 1286 (11th Cir. 2003)); *Grayson v. Thompson*, 257 F.3d 1194, 1232 (11th Cir. 2001) (denying *Ake* claim where trial was not rendered fundamentally unfair by absence of requested experts); *Duren v. Hopper*, 161 F.3d 655, 665 (11th Cir.

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testimony from the first trial into the record before the jury at the second trial, and he could do so now. The Defendant also could have subpoenaed at least one of his expert psychiatric witnesses to present live testimony at his second trial, and he can do so now." (Vol. 19, at 39-40.) The same order branded Whisenhant's failure to offer such evidence at the 1981 trial as "part of a litigation tactic." (*Id.* at 40.) Elsewhere in his Petition, Whisenhant attacks the legitimacy of this order; however, he never assails the accuracy of its sentiments in this regard.

[40] This finding holds particularly true given the posture of the case, the nature of the expert assistance Whisenhant had already received, and the purpose of the additional expert assistance sought. Petitioner did not argue then, and does not argue now, that he needed to retain psychiatrists to perform additional tests or to supplement their 1977 observations and analysis. Rather, the record shows that Whisenhant required any new information, analysis or other assistance from psychiatrists in constructing a defense at the 1981 trial.

1998) (rejecting *Ake* claim where defendant did not show that denial of expert would result in fundamentally unfair trial, particularly where trial court offered evaluation by state psychologist which defendant declined).

The record before the Court cannot reasonably support a conclusion that the denial of expert funds to the defense before the 1981 trial had a substantial or injurious effect or influence on the outcome. As mentioned *supra,* Whisenhant had unfettered access to the full panoply of expert testimony and reports he had compiled in connection with the 1977 trial, and could have introduced those materials into evidence at the 1981 trial had he seen fit. He also could have subpoenaed Dr. Brown (a local resident) to testify at his 1981 trial.[41] He could have availed himself of substantial lay witness testimony of insanity, as he did at the 1977 trial. In short, there are any number of ways that Whisenhant could have advanced his insanity defense, including the strategy actually adopted by his attorneys at the 1981 trial of arguing

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[41] In response to questioning at a post-trial hearing, Dr. Brown stated that he would have obeyed a defense subpoena for the 1981 trial, irrespective of whether he received any further compensation, and that his trial testimony in that event would have been substantially similar to that furnished in 1977. When asked by defense counsel at the 1981 post-trial hearing to elaborate on his expert opinions regarding Whisenhant's mental condition, Dr. Brown prefaced his remarks by saying, "most of this would be present in my previous testimony, as the Court knows." (Vol. 16, R. 735.)

that his behavior surrounding the killings was so bizarre that the defendant could not have been sane when he committed the offenses. Moreover, nothing in the record says that Dr. Brown would not have accepted the $500 fee approved by Judge McRae as compensation for testifying and assisting at the 1981 retrial.[42] Thus, even if *Ake* error had been committed through the trial judge's denial of funds for experts before the 1981 trial, any such error did not strip Whisenhant of his only defense.[43] Rather, any such

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[42] In this regard, the Court notes that Dr. Brown's entire bill for his assistance to the defense regarding the 1977 trial totaled approximately $800. Logically, it would appear to require less time and effort to prepare for and assist in the 1981 trial than for the 1977 trial, inasmuch as in 1981 Dr. Brown was already well-versed in the case and had fully and extensively examined Whisenhant. There is no indication that Dr. Brown would have needed to reexamine Whisenhant or conduct additional research antecedent to the 1981 trial, all of which he would have needed to do before the 1977 trial. Thus, it stands to reason that Dr. Brown's services would have cost less at the 1981 trial than they did in the 1977 trial, simply because fewer services would have been required for the retrial. It is therefore far from clear that the $500 authorized by the trial judge was insufficient to retain Dr. Brown to reiterate his prior testimony and expert conclusions at the 1981 trial.

[43] Whisenhant acknowledges as much in his § 2254 brief in which he asserts that his 1981 counsel had "a literal mountain of evidence at their fingertips" to support the insanity defense, notwithstanding the denial of expert funds. (Petitioner's Brief, at 94-101.) Indeed, petitioner concedes that his counsel could have used the testimony of Dr. Brown, Whisenhant's sister and James Bryant; the expert reports of Drs. Brown and Tanay; and the evaluations of the Federal Bureau of Prisons to make out an

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error would have been harmless, inasmuch as it would not have had a substantial and injurious effect or influence on the jury's verdict. *See Hicks*, 333 F.3d at 1286-87 (*Ake* error held harmless where trial court denied defense motion for psychiatric assistance to bolster insanity defense, but resulting error lacked substantial and injurious effect on guilty verdict or death sentence); *Conklin*, 366 F.3d at 1209-10 (finding no prejudice in refusal to appoint independent pathologist even though appellate court was "unable to understand why" trial court denied expert funds, where expert's testimony would not likely have altered jury's decision to discredit defense theory); *see generally Duren*, 161 F.3d at 665 (no denial of fundamentally fair trial where defendant rejected proffered evaluation by a state psychologist); *Westbrook v. Zant*, 704 F.2d 1487, 1497 (11th Cir. 1983) (no due process violation where evidence for which defendant sought psychologist could have been demonstrated by other methods, including subpoenaing witnesses).[44]

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insanity defense, notwithstanding the denial of expert funds. (*Id.*)

[44] Whisenhant speculates that the denial of expert funds also harmed him by denying his counsel necessary assistance "in preparing the anticipated cross-examination of the State's experts, to help defense interpret their answers, or to appear, if necessary, on rebuttal." (Petitioner's Brief, at 12.) This argument fails to show prejudice or harm to Whisenhant for three reasons. First, the State presented no expert testimony at the 1981 trial; therefore, it is hard to conceive of how the trial was rendered fundamentally unfair by Whisenhant's purported

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For all of the foregoing reasons, it is the opinion of this Court that the denial of expert funds before the 1981 trial was not "contrary to, or . . . an unreasonable application of, clearly established" Supreme Court precedent, or "based on an unreasonable determination of the facts in light of the evidence," as required by 28 U.S.C. § 2254(d). Furthermore, even if the trial court's ruling did violate *Ake* principles, no relief is warranted because the resulting error was harmless under the particular circumstances presented here.

B. Brady *Violations.*

Whisenhant's next ground for habeas relief is a claim for failure to disclose exculpatory evidence, in violation *of Brady v. Maryland,* 373 U.S. 83 (1963). In support of this claim, he points to three items that were purportedly wrongfully withheld by the State. The first two were FBI reports generated after the

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inability to rebut the State's expert testimony, which was never given. Second, as mentioned *supra*, there is no indication that the State's experts would have proffered any new theories at the 1981 trial, or that their testimony would have differed materially from their testimony in 1977. Whisenhant had the benefit of consultation with experts at the 1977 trial in rebutting the State's expert testimony, which benefit would carry over to the 1981 trial. Third, Whisenhant could have subpoenaed Dr. Brown to parry the State's expert thrust, based on Dr. Brown's extensive assistance to the defense at the 1977 trial and defense counsel's undoubtedly thorough grasp of Dr. Brown's opinions with regard to Whisenhant's mental status.

murder of Venora Hyatt, a convenience store clerk who had been abducted, murdered and mutilated almost six months to the day before the Payton killing.[45] The purpose of these reports was to assist in the Hyatt investigation, which at that time had not identified the perpetrator. One such report included a psychological profile of Hyatt's killer, who was described as "probably schizoid personality, possibly simple schizophrenic." (Vol. 39, at 356.) The second hypothesized that the culprit of the then-unsolved murder might be "suffering from simple schizophrenia." (*Id.* at 359.) The third withheld document was a police investigative statement taken from Sandra Heverly, a co-worker and acquaintance of petitioner, some eight days after his arrest. In that document, Heverly, who had dated Whisenhant for three or four months in 1974, indicated that he would sometimes "just laugh and them wouldn't be nothing funny," that "[h]is eyes get real glassy," that "he was weird," and that "[a]ll the people down at the Ship Yard that use[d] to work with him knew how weird he was." (*Id.* at 362-67.)[46]

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[45] After being apprehended for the Payton slaying, Whisenhant admitted to the Hyatt murder as well as a third convenience store clerk killing, that of Patricia Hitt in November 1975. Whisenhant pleaded guilty to first-degree murder charges regarding both the Hyatt and Hitt murders, and was sentenced to life imprisonment on each. (Petition, ¶ 6.)

[46] Heverly was called as a witness by the defense at the Rule 32 hearing, at which time she reaffirmed her 1976 statement. (Vol. 37, Hearing Transcript, at 20-21.) She also testified

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The defense did not receive any of these materials until the discovery process in the Rule 32 proceedings. In January 1995, Whisenhant amended his Rule 32 petition to include for the first time a *Brady* claim based on the two FBI reports, the Heverly statement, and certain other materials not germane to the instant Petition. (Vol. 35, at 164-71.) In support of his claim for Rule 32 relief on this basis, Whisenhant offered testimony of Dr. Brown at the Rule 32 hearing that these materials "conform[ ] with the opinion that [he had] expressed about Mr. Whisenhant before" and that such documents "would have been highly important" had he been given access to them before the 1987 trial. (Vol. 37, Hearing Transcript, at 28-32.)

In denying post-conviction relief on Whisenhant's *Brady* claim, the Alabama Court of Criminal Appeals opined that the challenged evidence was not material to the issues at trial because there was no reasonable probability that, had such items been disclosed to the defense, the results of the 1981 and 1987 proceedings would have been any different. (Vol. 42, R-44, at 7.) With regard to the 1981 guilt phase trial, the Alabama court explained, these documents could have made no conceivable difference because Whisenhant would not have introduced them into evidence,

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that although she was alone with Whisenhant on numerous occasions in unstructured settings, he had never threatened her, had never been violent to her, and had never displayed a weapon of any kind to her. (*Id.* at 25.)

consistent with his strategy of offering no evidence of insanity at that trial. (*Id.*) Moreover, notwithstanding Dr. Brown's testimony that he would have relied on the FBI reports and the Beverly statement at the 1987 trial, the Alabama court reasoned that

> "[i]n spite of Brown's strong expert testimony, the jury sentenced the appellant to death. The FBI reports concerned a theoretical killer in a different offense, and Beverly's statement concerned relatively mild behavior at a time well before the offense. Under the circumstances, there is no reasonable probability that, had these documents been disclosed, the appellant would not have been sentenced to death [at the 1987 trial]."

(*Id.* at 7-8.) Whisenhant now urges this Court to overturn the Alabama appellate court's ruling as contrary to clearly established Supreme Court precedent.

A prosecutor has an ironclad duty to provide an accused with all evidence in the State's possession that is materially favorable to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Moore v. Kemp*, 809 F.2d 702, 719 (11th Cir. 1987). Under time-honored *Brady* principles, "[d]ue process is violated when the prosecution suppresses evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Carr v. Schofield*, 364 F.3d 1246, 1254 (11th Cir. 2004). "Evidence is material under *Brady* if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Haliburton v. Secretary for Dep't of Corrections,* 342 F.3d 1233, 1238 (11th Cir. 2003) (citation omitted); *see also Carr,* 364 F.3d at 1254 ("Reversal is not required, however, where the evidence, although useful to the defense, was not likely to have changed the verdict.").

For purposes of the Petition, the Court assumes that the materials at issue were actually suppressed by the State in the 1981 and 1987 proceedings, and that such evidence was favorable to the defense theories of insanity (at the guilt phase) and mitigation (at the penalty phase). Hence, Whisenhant's *Brady* claim hinges on whether the withheld materials, considered collectively, are "material" to his guilt or punishment.

This Court is fully cognizant of the integral role played by the *Brady* rule in ensuring a fair, level playing field for criminal defendants and preventing convictions of the innocent. To the extent that the State failed to disclose potentially exculpatory materials to Whisenhant for nearly two decades after his arrest (which the State has not contested), such an omission is both disturbing and unacceptable. However, such a failing does not automatically give rise to a constitutional violation; rather, it does so only where there is a reasonable probability that the suppressed evidence, if disclosed, would have affected the result of the trial. The Court believes that Whisenhant substantially overstates the significance

of these materials and that, considered *in toto,* they could not reasonably have affected the outcome of either the 1981 guilt phase trial or the 1987 penalty phase trial.

As for the 1981 trial, the defense's conscious, calculated strategy was to offer no evidence of insanity. Accordingly, disclosure of the FBI reports and Heverly statement could not have affected the result of the 1981 guilt phase proceeding one whit; because the defense in all likelihood still would have presented no evidence. Indeed, even after being confronted with the FBI and Heverly documents at a deposition taken during the Rule 32 proceedings, defense counsel Morris Dees (who headed up the defense team at both the 1981 and 1987 trials) testified only as to how he would have used the documents at the 1987 penalty phase trial. (Vol. 38, at 290-95 & 303.) Indeed, Dees confirmed that "[a]t the guilt phase trial in 1981, we did not put on any evidence of his psychological makeup because we believed and I believed that we had a lock-down error in the case" arising from the denial of funds for psychiatric assistance. (*Id.* at 343.)[47] There is no

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[47] Elsewhere in his deposition, Dees was even more emphatic about his view that the trial court had erroneously denied expert funds. In explaining his reasons for not putting on evidence of insanity at the 1981 guilt phase trial, Dees testified, "I thought the error is locked-down, lead-pipe, four-square as you can get an error in the record." (Vol. 39, at 327.) Dees also explained that he felt that when expert funds were denied, "that was a locked-in error. I mean, that was a reversible error in this

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indication that Dees would have deviated from that strategy in any respect, even with complete knowledge of the two FBI reports and the Heverly statement at the time of the 1981 trial. On this record, then, there is no plausible basis for deeming the omitted evidence "material" with respect to the guilt phase proceeding, as the defense would not have attempted to use it at trial.[48]

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case. . . . And I felt it was my obligation to save this man's life." (Vol. 38, at 217.)

[48] In an attempt to salvage this issue, the defense argues that "the question is not what an ineffective lawyer would have done with the suppressed evidence," but is rather "what a reasonable attorney would have done." (Petitioner's Brief, at 22.) Whisenhant thus maintains that his 1981 counsel was ineffective in failing to offer evidence of insanity. In so contending, Whisenhant improperly conflates his *Brady* claim with his ineffective assistance claim. Petitioner cites no authority for the proposition that the *Brady* analysis may be intertwined and entangled with the *Strickland* ineffective assistance analysis in that manner, and that the *Brady* analysis hinges on what some other, hypothetical attorney might have done with that evidence. Rather, the appropriate analysis under *Brady* is whether there is a reasonable probability that the suppressed evidence would have made a difference at the 1981 guilt phase trial, all other things being equal. The Court therefore declines to make the unwarranted hypothetical leap for *Brady* purposes of assessing whether a different result would have obtained had both (i) the evidence been disclosed and (ii) a different attorney been representing Whisenhant. Besides, as discussed *infra*, the Court rejects the premise that the defense strategy of introducing no evidence of insanity at the 1981 trial constituted ineffective assistance of counsel.

Petitioner also attempts to bolster his *Brady* claim by arguing that the suppressed evidence was aggravated by prosecutorial

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With regard to the 1987 penalty phase proceedings, the Heverly statement and the FBI reports could have corroborated existing defense evidence. Upon review of the 1987 trial transcripts, however, it is clear that the defense offered extensive evidence in support of the insanity defense, calling some nine witnesses spanning two days of trial. Several of Whisenhant's co-workers at Ingalls Shipbuilding testified that he was a good worker who routinely worked around women, sharp objects and cutting tools without incident. (Vol. 25, RRR. 129-35.) Family friends, neighbors and acquaintances testified that Whisenhant had once tried to choke his wife, that his wife seemed afraid of him, but that he otherwise seemed "normal," rational and sane in all respects. (*Id.*, RRR. 137-47.) Dr. Brown testified at length about

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misconduct during closing arguments of the 1981 guilt phase trial. (Petitioner's Brief, at 22, 25.) At that time, the State argued to the jury that if the defense had found "any doctor, any friend, any co-worker, anyone that knew the Defendant and they said he is insane, don't you think you would have heard from them? You haven't heard a word." (Vol. 16, R. 618-19.) Petitioner is correct that the due process concerns underlying *Brady* may be exacerbated if the prosecution compounds the deception of suppressed evidence by arguing matters encompassed by that evidence at trial. *See, e.g., DeMarco v. United States,* 928 F.2d 1074, 1077 (11th Cir. 1991). However, this argument again vastly overestimates the significance of the suppressed evidence, none of which included any opinion by anyone that Whisenhant was insane. At most, the missing documents showed that Whisenhant had a co-worker who thought he was "weird" and that the Hyatt crime scene suggested a hypothetical perpetrator who might "possibly" be schizophrenic.

his observations of Whisenhant, including his diagnosis that Whisenhant is a schizoid personality, with paranoid and necrosadistic features and episodic discontrol. (*Id.*, RRR. 160.) Dr. Brown explained that Whisenhant is "emotionally flat," "a quiet loner," "highly distrustful of the motives of others," prone to inflicting destructive processes on the dead, and having episodes of lack of control. (*Id.*, RRR. 160-62.) He opined that Whisenhant has a mental disease that people around him in daily life would be unlikely to notice given its episodic manifestations. (*Id.*, RRR. 162.) Dr. Brown testified about Whisenhant's background, his difficult childhood, his domineering mother, his alcoholic father, and his history of violence against women dating back to his teenage years and culminating in the murder of three convenience store clerks on dates related to the birth of his own children. (*Id.*, RRR. 162-68.) Dr. Brown explained that the gruesome photos of Whisenhant's victims, including the post-mortem mutilation, supported his diagnosis at a "commonsensical level." (Vol. 26, RRR. 172.) He commented at length about Whisenhant's "miserably paralyzing, disturbing, hostile dependency upon his mother" and theorized that his victims were "mother substitutes." (*Id.*, RRR. 178.) In describing Whisenhant's crimes, Dr. Brown informed the jury that "[t]his is something that's strange, very, very strange in his head. It has no other explanation." (*Id.*, RRR. 185.) While on the stand, Dr. Brown read excerpts from Dr. Tanay's expert report, and utilized those excerpts to

corroborate and bolster his findings and opinions. (*Id.*, RRR. 189-96.)[49]

The defense also conducted a robust cross-examination of the State's mental health experts. Dr. William H. Rudder acknowledged that as to the mutilation of Whisenhant's victims, "we all admit that looks crazy. If you see that on the side of the road, you say, well, that guy is crazy, he's nuts." (Vol. 26, RRR. 342.) Dr. Rudder was cross-examined based on a report in which he opined that Whisenhant "possibly lacked adequate control" at the time of the Payton slaying. (*Id.*, RRR. 354.) He was also cross-examined using a statement he had made to defense counsel that he did not think anyone knew whether Whisenhant was medically insane when he killed Payton, and that he (Dr. Rudder) could not say whether Whisenhant knew what he was doing. (*Id.*, RRR. 360-62.) He was further cross-examined using Dr. Tanay's report. (*Id.*, RRR. 365-68.) The defense also cross-examined Dr. Rudder on his initial diagnosis that Whisenhant suffered from "[m]ixed personality disorder with paranoid, schizoid and antisocial features, severe." (*Id.*, RRR. 377.) In cross-examining a second prosecution expert witness, Dr. James

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[49] The upshot of Dr. Tanay's report was that Whisenhant "suffers from schizophrenia, paranoid type, and that he suffered from that illness at the time when he committed the crimes with which he is charged." (*Id.*, RRR. 194.) Dr. Tanay's conclusion was substantially similar to that of Dr. Brown; moreover, the jury had access to Dr. Tanay's complete report, which was admitted into evidence in the 1987 proceedings.

Kimbrough, the defense elicited testimony that Whisenhant has "a mental disorder," cross-examined him using Dr. Tanay's report, and introduced an interview Dr. Kimbrough had given in which he stated that he, Dr. Tanay and Dr. Brown might all be reaching the same sort of opinion as to Whisenhant's mental status. (*Id.*, RRR. 429-37.) Dr. Kimbrough allowed that Whisenhant "may have been" out of touch with reality when he killed Payton and acknowledged a prior statement that Whisenhant's "behavior is insane" during his violent episodes when he has an opportunity to kill women in an undetected manner. (*Id.*, RRR. 438-42.)[50]

Review of the 1987 trial transcripts inexorably yields the conclusion that the suppressed FBI reports and Heverly statement were not "material." To be sure, the FBI reports might have conferred some incremental evidentiary benefit to the defense. However, the fact remains that the defense constructed a detailed mosaic of evidence advancing its position that Whisenhant was under the duress of an extreme mental disturbance, that he was unable to appreciate the criminality of his conduct, and that he

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[50] The defense employed similar cross-examination tactics and tools in cross-examining the State's other expert witnesses, Virupaksha Kothandapani, Ph.D, and Dr. Noble Wayne Harrison. So as not to belabor the point, the Court will not enumerate specific instances of their cross-examination; however, the trial transcript plainly reflects that the defense had and utilized ample ammunition in cross-examining each of the State's mental health experts.

otherwise suffered from psychological and emotional problems when he raped and murdered Payton, all of which the defense contended were mitigating factors.

Against this backdrop, it is abundantly clear that the suppressed documents were merely cumulative and would have added precious little to the defendant's case. The FBI reports were nothing more than "psychological profiles" prepared by FBI agents based on review of the Hyatt crime scene. They involved a different crime and consisted of mere speculation about the psychological makeup of the perpetrator. Certain aspects of Whisenhant's character fit that profile, but others did not. Moreover, these profiles are riddled with "possibly"s and "probably"s and other equivocal language, which is hardly surprising given that Whisenhant was not in custody and these documents were in no way based on observation or diagnosis of him. The FBI reports did not diagnose Whisenhant as insane or suffering from extreme emotional disturbance, but simply hypothesized that Hyatt's then-unknown killer *might* be. Thus, at most, these "profiles" provided weak corroboration of certain aspects of defense evidence regarding Whisenhant's mental state.[51] If the finder of

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[51] Viewed in their most reasonable light, however, these reports are hardly earth-shattering. They say nothing more than the self-evident proposition that the grotesque post-mortem mutilation of Hyatt's corpse (which included excision of her breasts and deep abdominal cuts) might be the work of a deranged person. No expert – defense or prosecution – disputed that quite obvious point; rather, the State's witnesses testified

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fact at the 1987 penalty phase trial did not deem the defense's extensive showing of mental disturbance persuasive for mitigation, then there is no reasonable probability that two FBI reports steeped in guesswork and uncertainty, prepared by agents who had never heard of Tommy Whisenhant, relating to a different offense and generally consistent with both State and defense expert testimony, would have convinced them otherwise.[52]

Petitioner's "materiality" argument as to the Heverly statement is even weaker. She did not assert that he was insane. She did not testify that he engaged in overtly crazy or psychopathic conduct, such as attacking her, threatening her, hallucinating or the like. Heverly merely testified that he seemed "weird," that he smiled for no reason, that his eyes were "glassy," and the like. The Court questions

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that even though such actions *might* be the hallmark of a diseased mind, it does not necessarily follow that they *were*. Nothing in the reports would refute that line of reasoning.

[52] As a fallback position, the defense insists that the FBI reports had value "to impeach the testimony of the State's experts." (Petition, ¶ 23.) As discussed *supra*, the trial transcript is rife with defense efforts to impeach the State's experts using a broad array of reports, transcripts, prior statements and other documents. The FBI reports could not have been more than a marginal addition to the already-vast impeachment arsenal deployed by the defense. Any impeachment value in those reports was negligible, and use of the FBI reports (particularly given their patently speculative nature) on cross-examination would not have been substantially likely to undermine materially the credibility or opinions of the State's witnesses.

whether Heverly's statement, in its entirety, would have aided the defense theory at all; indeed, it seems at cross-purposes with defense testimony elicited from a parade of witnesses (friends, co-workers, acquaintances) that Whisenhant seemed entirely sane and normal in his day-to-day activities. The conduct described in Heverly's statement appears to describe a wholly different kind of behavioral defect from that touted by the defense.[53] Moreover, even assuming Heverly's statement was favorable to the defense, it is highly improbable that the innocuous conduct she described would have had a meaningful impact on a jury who rejected the defense's comprehensive mental illness mitigation evidence. Stated differently, if a veritable mountain of evidence of mutilated corpses, troubled childhood, and history of violent outbursts toward women coinciding with the birth of his own children, as well as expert testimony from two esteemed psychiatrists that he was a paranoid schizophrenic with episodic discontrol, did not convince a jury that Whisenhant was insane when he raped and killed Payton, it defies logic and common sense to think that a co-worker's statement

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[53] For example, at the 1977 trial, Dr. Brown testified that Whisenhant's mental illness was such that his friends would likely not have been aware of it. (Vol. 6, at 1008-09.) Dr. Brown further testified that Whisenhant's mental disease was one that he would not exhibit in his normal, everyday working life. (*Id.* at 1009.) Heverly's statement was directly to the contrary. Viewed in that light, her statement logically might have undermined Dr. Brown's opinion, rather than bolstered it.

that Whisenhant was "weird" and laughed inappropriately would have altered the jury's decision-making calculus.

Simply put, the Alabama court's determination that the State did not violate *Brady* was an objectively reasonable adjudication of clearly established federal law, and was based upon a reasonable determination of the facts. *See* 28 U.S.C. § 2254(d). This ground for habeas corpus relief is therefore denied.

C. Use at 1981 Trial of Jurors Who Knew of Petitioner's Prior Conviction.

Petitioner's third ground for § 2254 relief is that the trial judge allowed venire persons to remain on the venire and serve as jurors at the 1981 guilt phase trial, notwithstanding their knowledge that Whisenhant had previously been found guilty of the very offense for which he was being retried. In particular, Whisenhant argues that members of the 1981 venire either had prior knowledge of his 1977 conviction for the Payton slaying, or were seated on a panel where another prospective juror recounted such knowledge. (Petition, ¶ 28.) To make matters worse, petitioner contends, four venire persons with knowledge of the 1977 conviction ended up serving as jurors at the 1981 trial. (*Id.*) Whisenhant claims that the presence of jurors at the 1981 trial who knew he had been convicted of the same offense in 1977 violated the juror impartiality principles of *Irvin v.*

Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

The defense raised this very issue on direct appeal after the 1981 trial. In rejecting this claim, the Alabama appellate court opined as follows:

> "Having reviewed the questions and answers in relation to the entire jury venire selection process, we find no empaneled juror who expressed any belief in the relevancy of his or any other juror's recollections as to appellant's prior conviction. Viewing the totality of the circumstances, we simply do not find the vague knowledge of the jurors in this case as to appellant's prior conviction to have been inherently prejudicial to appellant's case. As well, appellant has failed to carry the burden of proving the existence of actual prejudice as a result of any such knowledge on the part of these jurors."

Whisenhant v. State, 482 So.2d 1225, 1233-34 (Ala.Crim.App. 1982). The Alabama Supreme Court affirmed this aspect of the decision without comment.

There is no question that constitutional notions of fairness require that a defendant have "a panel of impartial, 'indifferent' jurors." *Irvin,* 366 U.S. at 722. However, the *Irvin* standard does not require that a juror be a *tabula rasa*, "totally ignorant of the facts and issues involved," but merely requires that he be able to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Cummings v. Dugger*, 862 F.2d 1504, 1509

(11th Cir. 1989) (citing *Irvin*, 366 U.S. at 722-23); *see also Murphy v. Florida*, 421 U.S. 794, 800 n.4 (1975) (distinguishing between juror familiarity with the defendant and actual predisposition against him). To establish a Sixth Amendment claim on the basis of juror partiality, one must show that pretrial publicity and other circumstances resulted in a jury panel that was either actually or presumptively prejudiced against him. *See Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir.1985). Whisenhant argues that he is entitled to relief under the presumed prejudice formulation, and expressly foregoes any argument of actual prejudice. (Petitioner's Brief, at 29 n.10 (explaining that petitioner "does not address the Court of Criminal Appeals' finding that there was no actual bias").

In arguing that a presumption of prejudice attaches, Whisenhant relies on *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), in which the Supreme Court presumed prejudice from publicity aired during trial "[T]he *Rideau* principle of presumptive prejudice is only 'rarely' applicable, and is confined to those instances where the petitioner can demonstrate an 'extreme situation' of inflammatory pretrial publicity that literally saturated the community in which his trial was held." *Mayola v. State of Alabama,* 623 F.2d 992, 997 (5th Cir. 1980) (citation omitted) (rejecting *Rideau* claim for § 2254 relief where petitioner failed to offer newspaper circulation statistics to demonstrate pervasiveness or saturation level of prejudicial publicity

necessary to invoke *Rideau*); *see also Cummings*, 862 F.2d at 1509 (noting that prejudice is presumed from pretrial publicity only where publicity is sufficiently prejudicial and inflammatory and where it saturated the community). Relief is granted on a presumptive prejudice basis "only in extreme situations." *Id.* at 1511. Whisenhant has failed to come forward with any facts tending to show that this case falls within the "extreme situations" in which a prejudiced jury should be presumed.

Moreover, the Eleventh Circuit has unequivocally rejected the proposition that "juror exposure to information about a state defendant's prior convictions or to news accounts of the crime which he is charged alone presumptively deprives the defendant of due process." *Knight v. Dugger*, 863 F.2d 705, 721 (11th Cir. 1988) (citing *Murphy v. Florida*, 421 U.S. 794, 799, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975)). Other courts have reached similar determinations. *See, e.g., Thompson v. Borg*, 74 F.3d 1571, 1573-76 (9th Cir. 1996) (venireman's statement in presence of other jurors that he had read that defendant had previously pleaded guilty in this case was not prejudicial where remark was vague and awkwardly phrased, and jury did not know charge to which he had pleaded guilty). Accordingly, it is inappropriate to presume prejudice from the fact that four jurors were aware, either through pretrial publicity or comments of other venire members during jury selection, that Whisenhant had previously been adjudged guilty in this case.

Nonetheless, Whisenhant insists that the venire members' statements that he had previously been found guilty of the same offense were so inflammatory and inherently prejudicial that all members of the pool who heard such statements were irretrievably poisoned. (Petitioner's Brief, at 31-34.) To evaluate this claim, it is critical to bear in mind what was actually said during the 1981 jury selection process.

The four jurors whom Whisenhant protests had knowledge of his previous conviction were Jurors Macon, Johnston, Stevens and Emerson.[54] In response to defense questioning about pretrial publicity, Juror Macon stated, "I believe the thing was thrown out, was it not, to be retried." (Vol. 13, R. 142.) Juror Macon also indicated, "I don't recall a lot about it" and said, "I don't remember any details or anything." (*Id.*, at 142-43.) Such nebulous remarks do not give rise to a plausible inference that Juror Macon had actual knowledge that Whisenhant had previously been convicted, and defense counsel failed to ask

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[54] Jurors were examined about pretrial publicity in panels of three or four; therefore, in some instances petitioner is concerned about statements actually made by the prospective juror, while in others the petitioner's concern is with statements made by other venire members in that juror's presence. Prior to trial, the trial court explained that questioning on pretrial publicity would be conducted in small groups, rather than individually, became "there has been little or no publicity in Mobile concerning the Whisenhant case in three years." (Vol. 13, R. 20.)

him follow-up questions in that regard. As such, Whisenhant's claim that Juror Macon knew of his previous conviction is unfounded.

When Juror Stevens' panel was called in for questioning, the prosecution repeatedly asked all four members of his panel whether they could base their verdict solely on the evidence and testimony they heard at trial, and whether they could put out of their minds anything they may have previously heard or read about the case. (Vol. 14, R. 246-47, 251.) All four panelists responded affirmatively. After the State was finished, the defense inquired further about pretrial publicity. One venire member stated, "I believe the Defendant was found guilty, in the trial in Birmingham and then it discontinued." (*Id.*, R. 253.) Defense counsel immediately asked Juror Stevens if that was consistent with his recollection, but Juror Stevens responded, "I'm not sure. I know that it was overturned, but I'm not sure." (*Id.*)[55] Thus, even after

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[55] Whisenhant also claims that Juror Stevens was tainted because he had read in the newspaper about "what was done to the bodies afterwards." (*Id.*, R. 257.) However, this argument is undermined by the fact that the defense readily acknowledged that Whisenhant had mutilated the bodies of at least two of his victims, and in fact presented such facts to the jury in support of the insanity defense. The State mentioned exactly such facts to other panels during voir dire without defense objection. (Vol. 13, R. 173.) As such, the Court cannot find that Juror Stevens' pretrial knowledge of the mutilations, in and of itself, prejudiced him against Whisenhant based on admitted facts and evidence introduced at trial without objection. The defense itself relied on these facts in its opening statement. (Vol. 14, R. 373-74.)

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another panel member stated a hazy, ill-defined "belief" that Whisenhant had previously been found guilty, Juror Stevens stated under oath that he did not know whether the other panel member was correct. This record therefore does not support a reasonable inference that Juror Stevens was poisoned against Whisenhant from the outset by actual knowledge of his 1977 conviction.

The other two jurors at issue made no statements suggesting knowledge of the outcome of the prior trial, but were present when others did. During Juror Johnston's panel questioning, he did not express any knowledge about the case; however, one of his colleagues on the panel stated that, while he remembered "not too much detail," he thought that Whisenhant had raped and murdered two or three convenience store clerks and that "he was tried and given life, I think." (Vol. 13, R. 180.) Once again, this equivocal, uncertain, isolated, partially incorrect statement by a venire member as to the outcome of a

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Besides, defense counsel never asked any follow-up questions as to whether Juror Stevens' knowledge of the mutilation would affect his ability to be fair and impartial. Thus, the only record evidence as to the effect of pretrial publicity on Juror Stevens is his affirmation that he would be able to put all the pretrial publicity out of mind and render a verdict based solely on evidence adduced at trial. In light of this record, the Court cannot and will not impute partiality to Juror Stevens merely because he may have read in the newspaper that Whisenhant mutilated the bodies of his victims, where Juror Stevens himself clearly stated that he could remain impartial and the facts in question were actually presented at trial by the defense.

prior trial can hardly be viewed as biasing another panel member against the defense.

Finally, Juror Emerson served on a panel at which another prospective juror stated that Whisenhant "was convicted of murdering the lady in the Pak-A-Sack, I believe, . . . and tried and convicted." (Vol. 14, R. 264.) After the other panelist made these statements, Juror Emerson was asked about his knowledge of the case in the following exchange:

> "MR. DEES: Mr. Emerson, could you tell me what pretty much sticks in your mind about what you may know about this case from pretrial publicity?
>
> "JUROR: Just the 7-11 girl was taken from the 7-11, and as far as conviction, I never even –
>
> "MR. DEES: Never knew it?
>
> "JUROR: I travel, so I'm out of town."

(*Id.*, R. 265.) After similar questions were asked of each juror on the panel, the trial judge asked the panelist who said Whisenhant had been convicted whether she would sit and listen to the evidence and make her own determination of the evidence, to which she responded affirmatively. (*Id.*, R. 266.) Defense counsel then asked whether the other panel members (including Juror Emerson) agreed, and all panel members except for a Mrs. Bonier in fact did agree. (*Id.*, R. 266.) From this transcript, it is plain that Juror Emerson had no knowledge of

Whisenhant's prior conviction from pretrial publicity, and that even after hearing another venire member express a belief that he had been convicted, Juror Emerson continued to profess his belief that he could reach a verdict based on the evidence.

In sum, then, of the four jurors to whom Whisenhant ascribes prior knowledge of his 1977 conviction, the record shows that none harbored a definitive understanding of that fact. The record does not show that Juror Macon knew anything about the prior verdict. Jurors Stevens and Johnston knew nothing independently, but were present when other panel members made stray, indefinite, equivocal statements that they "thought" or "believed" he had been convicted of an unspecified offense. As for Juror Emerson, he had no independent knowledge of Whisenhant's conviction. Although he heard another panel member state that Whisenhant had been convicted of an unspecified offense related to the Payton killing, Juror Emerson assured the trial court that he could decide the case based on the evidence.[56]

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[56] In weighing Whisenhant's contention that these four jurors were automatically tainted, the Court bears in mind that the "conduct of voir dire is a matter entrusted to the broad discretion of the trial judge." *Cummings v. Dugger*, 862 F.2d 1504, 1507 (11th Cir. 1989) (jury selection not constitutionally deficient where jurors exposed to pretrial publicity were reminded of importance of impartiality and were given opportunity to discuss doubts about their ability to remain impartial). Moreover, "deference must be paid to the trial judge's decision regarding the partiality of an individual juror because of the credibility determination involved." *Id.* at 1510. Judge McRae

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Defense counsel was free during the voir dire process to pose follow-up questions of these four jurors to confirm or negate their impartiality, notwithstanding their receipt of equivocal information suggesting that Whisenhant might previously have been found guilty. Defense counsel neglected to ask such follow-up questions, or even to request leave of the trial court to conduct such further and additional interrogation of the venire members to ascertain whether they had been prejudiced by what they had heard from fellow prospective jurors.

In the final analysis, the Court is of the opinion that this ground for error overplays Whisenhant's hand. If the judge or the prosecutor had informed the venire panel that he had previously been convicted of capital murder in connection with the Payton slaying and that this case was being retried because of procedural error, *Irvin* would undoubtedly be implicated. If the four jurors themselves had stated during voir dire that they had a specific recollection of Whisenhant's previous conviction for the Payton murder, an *Irvin* claim could potentially be cognizable. But the record shows that these jurors had no knowledge of the outcome of the previous trial, aside

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observed the demeanor of the jurors as they answered questions and listened to their colleagues discuss pretrial publicity. His conclusion that these four jurors were capable of serving in the case despite exposure to information regarding the prior trial is therefore entitled to deference. Petitioner offers no facts or evidence to outweigh that deference.

from a general understanding borne of vague, indefinite, uncorroborated statements made during jury selection by total strangers. Such statements by other panel members were non-specific, imprecise, and ambiguous. This was not information that the four jurors saw on a television screen or read in a newspaper, with the credibility cachet of being seen with their own eyes; rather, these were uncertain statements from fellow venire members as to what they "believed" or "thought" they had read in pretrial publicity dating back several years. There is no evidence that any of these four jurors even believed their fellow venire members, much less that they were so tainted by their comments that they were incapable of setting them aside and rendering a verdict based on evidence presented in court; indeed, the voir dire transcript shows the exact opposite to be true. *See, e.g., Mills v. Singletary*, 63 F.3d 999, 1009 (11th Cir. 1995) ("To demonstrate actual prejudice, a defendant must prove that one or more jurors entertained an opinion of guilt before trial and that these jurors could not put this prejudice aside and render a verdict based solely on the evidence presented"). Nor was this information (in the indefinite, uncertain manner in which it was provided) of a sufficiently reliable, credible caliber that it can be reasonably deemed so inflammatory and prejudicial that it presumptively prejudiced the jurors against Whisenhant. *See, e.g., Cummings*, 862 F.2d at 1509 (noting that prejudice is presumed only where pretrial publicity is sufficiently prejudicial and inflammatory). Based on these findings, coupled with the deference

to which Judge McRae's determinations in the administration of voir dire are entitled, the Court cannot say that the Alabama Court of Criminal Appeals' ruling on the *Irvin* issue was "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). As such, habeas relief is not warranted on this claim.[57]

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[57] Whisenhant's reliance on *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978), is misplaced. In *Williams*, the former Fifth Circuit deemed a trial unfair where jurors learned by a newscast that the defendant had previously been convicted for the very offense for which he was now charged. However, the *Williams* court made no reference to any constitutional standard; to the contrary, its ruling was predicated on a line of authority that it acknowledged "is considerably broader than the constitutional standard and provides more protection against prejudice." *Id.* at 469; *see also Murphy v. Florida*, 421 U.S. 794, 798 (1975) (unequivocally rejecting proposition that authority relied on by *Williams* has any application beyond the federal courts). Likewise, the Fourth Circuit's decision in *Arthur v. Bordenkircher*, 715 F.2d 118 (4th Cir. 1983), is readily distinguishable because in *Arthur*, the trial court instructed the jury that the defendant had already been convicted of the same crime and that the case was being retried because the prior conviction had been thrown out on procedural grounds. *Id.*, at 120. By contrast, in this case, venire members received no such instructions, but harbored at most dim recollections that Whisenhant had been convicted.

D. Prosecutorial Misconduct During 1981 Guilt Phase Trial.

Petitioner's next assignment of error relates to alleged prosecutorial misconduct during the 1981 guilt phase trial. In particular, the Petition alleges that prosecutors misled the jury in closing arguments, indicating that the defense's failure to present expert or other testimony of insanity was proof that Whisenhant was not insane, when (1) the prosecution knew that the defense motion for funds for psychiatrists had been denied, and (2) the prosecution was concealing the FBI reports and Heverly statement which might have strengthened the insanity defense. (Petition, ¶¶ 3031; Petitioner's Brief at 38-40.)

This claim was not raised at trial or on direct appeal, but was presented in the Rule 32 petition, where Whisenhant objected to the State's closing argument based on both the denial of expert funds and the suppression of the Heverly statement. (Vol. 36, at 294-95, 367-69; Vol. 42, R-40, at 41-43.)[58] The

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[58] Curiously, the amended, supplemented Rule 32 petition did not rely on the suppressed FBI reports in objecting to the prosecutor's closing argument, but instead focused solely on the denial of the motion for funds and the Heverly statement. Thus, it appears that the argument that the prosecutor's closing argument was rendered improper by the existence of the FBI reports is being proffered *for the first time*, in this Petition. In his brief petitioner maintains that the Alabama appellate court "ignored" his arguments relating to the FBI reports as to the improper closing argument claim. (Petitioner's Brief, at 40.) The

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Rule 32 trial judge found this claim to be procedurally barred because it could have been but was not raised at trial. (Vol. 37, at 417.) On appeal, the Alabama Court of Criminal Appeals agreed with this result, but modified its reasoning as follows:

> "The court properly determined that all of the prosecutor's argument except the statement concerning a co-worker could have been challenged at trial. Relief based upon that statement was properly denied on another procedural ground. When the trial court's ruling is correct for any reason, the judgment is due to be affirmed on appeal."

(Vol. 42, R. 44 at 4.)[59] The appellate court proceeded to explain that "[t]he behavior described by Sandra Heverly clearly fell short of insanity" and there was no evidence that the prosecutor had deceptively suppressed that statement. (*Id.*) Because petitioner failed to plead and prove the facts necessary for relief under Rule 32, the Alabama court denied his prosecutorial misconduct claim. (*Id.*)

Alabama courts "ignored" such arguments for the simple reason that they were not presented; indeed, the Court has scoured petitioner's Rule 32 briefs in vain for any reference to the FBI reports in the context of the improper closing argument claim.

[59] Petitioner's suggestion that the appellate court overturned the trial court's finding of procedural default in its entirety as to this claim is incorrect (Petition, ¶ 32; Petitioner's Brief at 37-38.)

Analysis of this claim is properly divided into three parts. First, to the extent Whisenhant bases his claim of misconduct on the prosecutor's knowledge that the defense had been denied funds for expert witnesses, that argument was foreclosed by the Alabama Court of Criminal Appeals' finding of procedural default as to that portion of the claim. *See Bailey v. Naigle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999) (federal habeas claim is barred where state court correctly applied a procedural default principle of state law to defeat a federal claim). Accordingly, this aspect of the misconduct claim cannot be pursued here absent a showing of cause and prejudice. *Id.* at 1302. To establish cause for the procedural default, Whisenhant maintains that his trial counsel was ineffective in failing to object to the prosecution's misconduct during closing arguments of the 1981 guilt phase trial. Elsewhere in his brief; however, petitioner withdraws his claim that counsel was ineffective in failing to object to prosecutorial misconduct. (Petitioner's Brief, at 107.) Because petitioner has voluntarily withdrawn his claim that counsel was ineffective in farting to object to the State's closing arguments, such alleged ineffective assistance cannot rescue an otherwise procedurally barred claim arising from that ineffective assistance.[60]

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[60] Even if petitioner had not waived his ineffective assistance argument, the requisite cause would remain lacking as to this claim. Specifically, the Court cannot find that it was outside the wide range of professional competence for defense counsel not to object to a factually correct statement by the State

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Cause for the procedural default is not present here. Accordingly, this claim is not cognizable to the extent it asserts that the State engaged in misconduct by arguing to the jury that the defense had put on no evidence of insanity after Judge McRae denied the defense motion for funding to present such a defense.[61]

Second, to the extent this claim for § 2254 relief rests on a contention that the closing argument was improper because of suppressed FBI reports, Whisenhant never presented this aspect of the claim to any Alabama court at any time. Any attempt by Whisenhant to exhaust this portion of the claim in state court at this time would be futile. *See* Rule 32.2(b), Ala.R.Crim.P. (successive post-conviction petitions on different grounds are denied unless the court lacked jurisdiction to convict or sentence, or unless the new grounds were not known or could not have been ascertained through reasonable diligence when first petition was heard). Accordingly, any prosecutorial misconduct claim predicated on the

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in closing arguments that the defense had failed to put on any evidence of insanity. Because trial counsel did not furnish ineffective assistance in this regard, counsel's performance cannot excuse the procedural default of this portion of the claim.

[61] Whisenhant contends that the Alabama appellate court's resolution of the improper argument claim was flawed because it "ignored" the aspect of the claim relating to denial of expert funds. (Petitioner's Brief, at 40.) Contrary to Whisenhant's characterization, the Alabama court did not ignore that aspect of the claim, but instead properly found it to be procedurally barred.

State's closing arguments misleading the jury with respect to the FBI reports is procedurally defaulted. Whisenhant has suggested no cause for this default; therefore, this claim is barred under applicable law. *See Snowden v. Singletary,* 135 F.3d 732, 736 (11th Cir. 1998) (when it is obvious that unexhausted claims are subject to a state-law procedural default, such claims provide no basis for federal habeas relief).

Third, to the extent that this claim rests on the Heverly statement, it is clearly not procedurally defaulted because the defense did not even learn of the existence of that statement until approximately 1993, after Whisenhant's direct appeals had been exhausted, and did present this aspect of the claim in Rule 32 proceedings. Accordingly, this claim will be considered on the merits. For due process claims predicated on prosecutorial misconduct during closing arguments, the appropriate standard is "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464 (1986) (citation omitted) (rejecting habeas claim where the challenged argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent). The Eleventh Circuit has expounded on the standard of review as follows:

> "[A] prosecutor's argument violates the Constitution if it renders the defendant's trial so fundamentally unfair as to deny him

> due process. Improper argument by a prosecutor reaches this threshold of fundamental unfairness if it is so egregious as to create a reasonable probability that the outcome was changed. . . . Thus, the defendant must show a reasonable probability that, but for the prosecutor's statements, the result of the proceeding would have been different."

Davis v. Zant, 36 F.3d 1538, 1545 (11th Cir. 1994) (internal citations and quotations omitted); *see also Carr v. Schofield,* 364 F.3d 1246, 1257 (11th Cir. 2004) (habeas relief for improper closing arguments is granted only if the proceeding was rendered fundamentally unfair). In assessing whether the requisite "reasonable probability" exists, *Davis* teaches that relevant criteria include (1) the extent to which the challenged remarks are misleading and prejudicial; (2) whether they were isolated or extensive; (3) whether they were deliberate or accidental; and (4) the strength of the competent proof to establish guilt. *Davis,* 36 F.3d at 1549.

The challenged statement here is the prosecution's argument that if the defense "had found any doctor, any friend, any co-worker, anyone that knew the Defendant and they said he is insane, don't you think you would have heard from them? You haven't heard a word." (Vol. 16, R. 618-19.) According to Whisenhant, this argument was misleading and improper because the prosecution knew about Heverly's statement and had not shared it with the defense.

The alleged improper argument falls well short of rendering the 1981 guilt phase trial fundamentally unfair. With regard to the first *Davis* factor, the statement in question was not substantially misleading to the jury. The defense, acting pursuant to a carefully crafted strategy, in fact had not offered testimony that Whisenhant was insane, even though they admittedly possessed a "mountain of evidence at their fingertips" to support such a claim. (Petitioner's Brief at 94.) Therefore, the statement in question certainly did not misrepresent the evidence. More importantly, as the Alabama appellate court recognized, the Heverly statement did not amount to a co-worker testifying that Whisenhant was insane; to the contrary, she merely outlined fairly benign behaviors by the defendant (such as laughing when them was nothing funny and becoming "glassy-eyed") and stated that she found him to be "weird." Such comments are a far cry from a co-worker or friend opining that Whisenhant was insane, or describing behaviors tending to show insanity. Therefore, the premise of this claim (*i.e.*, that the prosecutor's statement misled the jury) misses the mark. Whisenhant fares no better under the remaining elements of the *Davis* yardstick. With regard to the second factor, the objection relates only to an isolated comment in a protracted closing argument; thus, the challenged remarks cannot reasonably be characterized as "extensive." Third, as the Alabama appellate court correctly noted, there is no evidence that this was an intentional act of deception by the prosecution. Fourth and finally, the quantum of

competent proof to establish Whisenhant's guilt and to defeat his insanity defense was quite substantial.

In light of the foregoing analysis, there is no reasonable probability that prosecutorial misconduct during closing arguments of the 1981 guilt phase trial changed the result of the trial. Indeed, the Court cannot find fault in the Alabama appellate court's analysis of this issue in the Rule 32 context. Because petitioner cannot show that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, this claim for habeas relief is properly denied.

E. Improper Jury Instructions During 1981 Guilt Phase Trial.

The Petition also assigns error to jury instructions given during the 1981 guilt phase trial In particular, Whisenhant takes issue with the following instruction:

> "The law then recognizes that human beings have the power of exercising the brain and determining that they will or will not do something, and if a person does an act after thinking about it and exercising his power and deciding that he will do it, then in the eyes of the law it is a willful act"

(Vol. 16, at 627-28.) There was no defense objection to this instruction at trial, nor was the issue raised on direct appeal. In the Rule 32 petition, however,

Whisenhant argued for the first time that this instruction contravened the presumption of innocence by creating presumption of wilfulness that a defendant must rebut. (Vol. 36, at 295.) According to Whisenhant, this instruction violated *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), in which the Supreme Court struck down a jury instruction that effectively shifted the burden of persuasion on intent to a defendant. The Rule 32 trial court deemed Whisenhant's *Sandstrom* claim to be procedurally defaulted, inasmuch as it could have been but was not raised at trial or on direct appeal. (Vol. 37, at 418-20.) The Alabama Court of Criminal Appeals agreed that the jury instruction "was procedurally barred under Rules 32.2(a)(3) and (5), Ala.R.Crim.P." (Vol. 42, R-44, at 3.)

Petitioner now raises this claim in his § 2254 petition, contending that the wilfulness instruction "shifted the burden of proof to petitioner by implying that his actions were to be presumed willful unless he proved otherwise." (Petition, ¶ 33.) In asserting this claim, Whisenhant concedes that it was not raised at trial or on direct appeal, and that he therefore must establish cause for the procedural default and prejudice attributable thereto in order to proceed. (Petitioner's Brief, at 47.) As cause for this procedural default, Whisenhant points to alleged ineffective assistance by his trial and appellate counsel. (*Id.* at 47-48, 107-08.) As a matter of law, petitioner is correct that ineffective assistance of counsel may

constitute cause to excuse a procedural default in a habeas claim. *Fortenberry v. Haley*, 297 F.3d 1213, 1222 (11th Cir. 2002) ("A petitioner can establish cause by showing that a procedural default was caused by constitutionally ineffective assistance of counsel under *Strickland*").[63] In evaluating this assertion, the Court bears in mind the Eleventh Circuit's admonition that

> "When reviewing whether an attorney is ineffective, courts should always presume strongly that counsel's performance was reasonable and adequate. . . . Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioners' to bear, is and is supposed to be a heavy one. . . . [T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between."

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[63] "Of course, this general tenet is subject to the proviso that an ineffective assistance claim constitutes "cause" for a procedural default only if the ineffective assistance claim itself is not procedurally defaulted. *See Nelson v. Schofeld*, 371 F.3d 768, 770 n.4 (11th Cir. 2004); *see also Edwards v. Carpenter*, 529 U.S. 446, 452-53, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000). That caveat is not in play here because Whisenhant did argue in his Rule 32 petition that trial and appellate counsel had provided ineffective assistance by failing to object to improper jury instructions at the 1981 guilt phase trial. (Vol. 36, at 302, 398.)

Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994) (internal quotations and citations omitted); *see also Caderno v. United States*, 256 F.3d 1213, 1217 (11th Cir. 2001) ("There is a strong presumption that counsel's performance was reasonable and adequate, with great deference shown to choices dictated by reasonable trial strategy.").

The fundamental problem with Whisenhant's "cause" argument is that his counsel could not have been constitutionally ineffective in failing to object to a jury instruction that on its face does not appear to violate the principles espoused in *Sandstrom*. As the *Sandstrom* Court explained, where the constitutionality of a jury instruction is at issue, "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." 442 U.S. at 514. After careful review of the contested instruction, the Court is at a loss to understand how a reasonable juror could have construed it as shifting the burden of proof to the defendant to prove that his acts were not willful.[64] To the contrary, that instruction plainly says that an act is willful only if a person commits it after (a) thinking about it, (b) exercising his power, and (c) deciding that he will do it. It does not purport to shift the burden of proof to a defendant, nor can it be

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[64] In this regard, it bears noting that both the Rule 32 trial court and the Alabama Court of Criminal Appeals shared this Court's assessment that the challenged instruction was devoid of *Sandstrom* error. (Vol. 37, at 459; Vol. 42, R-44, at 9.)

reasonably construed as doing so.[65] *Compare High v. Kemp*, 819 F.2d 988, 994 (11th Cir. 1987) (finding *Sandstrom* error where trial court instructed "that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but the presumption may be rebutted"). It is the opinion of this Court that it was not constitutionally defective performance for Whisenhant's counsel to fail to object to the willfulness instruction under *Sandstrom*, where any *Sandstrom* error therein is so cleverly concealed that neither this Court nor two Alabama state courts could find it. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("it is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance of counsel"); *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984) (counsel is not ineffective for failing to raise issues "reasonably considered to be without merit").

For all of the foregoing reasons, the Court finds that this claim is procedurally barred, and that

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[65] This conclusion is reinforced by a line just three sentences before the contested charge, in which the jury was specifically informed that "[t]he State has the burden of proving each of these elements [specifically including, the *mens rea* requirement] beyond a reasonable doubt and to a moral certainty before this Defendant can be found guilty of a capital felony." (Vol. 16, at 627.) Viewing the instructions as a whole, no reasonable juror could have been confused as to where the burden of proof on willfulness lay.

Whisenhant has failed to show cause and prejudice to excuse the procedural default.

F. Batson *Claim Relating to 1981 Guilt Phase and 1987 Penalty Phase.*

Whisenhant's sixth claim for habeas relief is that the prosecution utilized peremptory strikes in a racially discriminatory manner at both the 1981 and 1987 trials, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). With regard to the 1981 trial, petitioner notes that approximately 30% of the venire (13 out of 43) was black, but that the State used 8 of its 10 peremptory challenges (80%) to strike black venire members. (Vol. 39, at 472-73.) At the 1987 trial, Whisenhant claims, a discrepancy also existed, as approximately 30% of the venire (16 out of 52) was black, but the State used 47% of its peremptory challenges (9 of 19) to strike blacks. (*Id.* at 474-76.) Ultimately, there were three blacks on the 1981 jury and five blacks on the 1987 jury. (*Id.* at 472-76.)[66] Whisenhant argues that the State offered no justification "for the wholly disproportionate pattern of strikes" and insists that its actions violated *Batson* and *Powers v. Ohio*, 499 U.S. 400 (1991). (Petition, ¶ 35.)

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[66] For whatever it may be worth, the record also reflects that there were six black members of the jury that convicted Whisenhant in 1977. (Vol. 13, R. 102.)

As with the *Sandstrom* claim discussed *supra*, Whisenhant admits that he did not present his *Batson* claim either at trial or on direct appeal. (Petitioner's Brief, at 50). This claim was presented in petitioner's Rule 32 filing; however, the trial judge deemed it procedurally barred because it could have been but was not raised at the 1981 or 1987 trials and on appeal. (Vol. 37, at 417-20.) On appeal, the Alabama Court of Criminal Appeals concluded that the *Batson* challenge "was procedurally barred under Rules 32.2(a)(3) and (5), Ala.R.Crim.App." (Vol. 42, R-44, at 3.) Once again, Whisenhant seeks to establish "cause" for his procedural default by asserting that his trial counsel provided ineffective assistance in failing to make a contemporaneous objection. (Petitioner's Brief, at 50-51, 106-07.)[67]

This argument need not long detain the Court. The Eleventh Circuit has unequivocally, repeatedly held that defense counsel's failure to raise a *Batson* challenge prior to the issuance of the *Batson* decision is not, and cannot be, ineffective assistance of

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[67] In his Rule 32 deposition, lead defense counsel at the 1981 trial explained that he did not object to the State's use of peremptory challenges to strike blacks "because [he] didn't know of any law that gave a white defendant charged with killing a white person where there's no racial issues any basis for trying to use a *Batson* type challenge, even though *Batson* hadn't come down." (Vol. 39, at 331.) Defense counsel also explained that his understanding of the law at the 1987 trial was that a white defendant could not rely on *Batson* to overturn strikes of black jurors "until the Supreme Court ruled later" that he could. (*Id.* at 331-32.)

counsel, as a matter of law. *See Wright v. Hopper*, 169 F.3d 695, 707-08 (11th Cir. 1999) (rejecting habeas claim that trial counsel was ineffective for failing to raise a *Batson* objection because petitioner's trial predated *Batson*); *Pitts v. Cook*, 923 F.2d 1568, 1574 (11th Cir. 1991) ("A counsel's pre-*Batson* failure to raise a *Batson*-type claim does not fall below reasonable standards of professional competence, and thus does not render counsel's assistance constitutionally ineffective."); *Poole v. United States*, 832 F.2d 561, 565 (11th Cir. 1987) ("The problem with faulting the public defender for failing to raise a *Batson* objection at trial is that *Batson* had not been decided yet"). Thus, it is beyond dispute that defense counsel's failure to raise a *Batson*-type challenge at the 1981 trial did not constitute ineffective assistance.

By the 1987 trial, of course, *Batson* had been handed down; however, that holding was limited in scope. There was no binding precedent extending *Batson* to a white-on-white murder with no racial overlay. The *Batson* decision itself was clear that a viable constitutional claim existed only if the defendant can "show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges ***to remove from the venire members of the defendant's race***." 476 U.S. at 96 (emphasis added). Between 1986 and 1990, the Eleventh Circuit routinely construed *Batson* as confined in application to cases involving discriminatory striking of prospective jurors of the defendant's race. *See, e.g., United States v. Rodriguez*, 917 F.2d

1286, 1288 (11th Cir. 1990) (declaring that Hispanic defendant lacked standing under *Batson* to challenge prosecutor's exercise of peremptory challenges to exclude blacks); *United States v. Rodriquez-Cardenas*, 866 F.2d 390, 392 (11th Cir. 1989) (similar).[68] Thus, no law in 1987 would extend *Batson* protection to Whisenhant if the State disproportionately struck black members from the venire; in fact, binding precedent was exactly to the contrary. By its terms, defense counsel could not have relied on *Batson* at that time.

To be sure, four years after the 1987 penalty phase proceeding, the Supreme Court extended *Batson* to allow any defendant (regardless of race) to raise constitutional objections based on the racially-motivated exclusion of jurors. *Powers v. Ohio*, 499 U.S. 400, 415-16, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (holding that "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges"). However, it was absolutely not constitutionally defective performance for Whisenhant's attorneys to fail to predict the *Powers* ruling in 1987. *See United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001) (describing "a wall of

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[68] The Eleventh Circuit was by no means unique in its narrow construction of *Batson* in the 1986-1990 time frame. *See, e.g., United States v. Townsley*, 856 F.2d 1189, 1190 (8th Cir. 1988) (en banc) (nonblack defendants cannot rely on *Batson* to challenge government's use of peremptory challenges to exclude black potential jurors from jury); *United States v. Angiulo*, 847 F.2d 956, 984 (1st Cir. 1988) (same).

binding precedent that shuts out any contention that an attorney's failure to anticipate a change in the law constitutes ineffective assistance of counsel."); *see also Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir.1994) ("We have held many times that reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.") (citations omitted).[69]

For the foregoing reasons, the Court finds that it was not constitutionally ineffective assistance for Whisenhant's trial counsel to fail to raise *Batson*-type challenges at the 1981 and 1987 proceedings. As petitioner has not shown "cause" to excuse his procedural default of the *Batson* claim, the Court cannot review such claim on the merits at this time.

G. Lack of Impartiality by Trial Court at 1987 Penalty Phase Trial.

The Petition also asserts that habeas relief is required because the trial judge was biased against Whisenhant at the time of the 1987 trial. This claim

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[69] This conclusion holds regardless of how meritorious the underlying *Batson/Powers* claim might be. Indeed, "the rule that it is not ineffective assistance for an attorney to fail to foresee a change in the law applies even when the change is such that the forfeited issue was, in hindsight, a sure fire winner." *Ardley*, 273 F.3d at 993. Therefore, the State's failure to proffer a nondiscriminatory explanation for its pattern of peremptory strikes is inconsequential.

has two distinct components that must be analyzed separately for § 2254 purposes.

1. Trial Judge's Prior Death Sentences and Pretrial Comments.

The first aspect of the judicial bias claim is petitioner's contention that "Judge McRae had a fixed, pre-trial opinion that death would be the appropriate sentence that made it impossible for him to be impartial" at the 1987 penalty phase trial. (Petition, ¶ 40.) In support of this theory, Whisenhant relies on the following facts: (i) before the 1987 trial, Judge McRae had previously sentenced him to death on two occasions; and (ii) during a hearing before the 1987 trial, Judge McRae commented that "[t]he victim in this case, as I recall the evidence, was abducted with Entebbe precision and he certainly has to – you know, which an irrational person I do not believe could have formed." (Vol. 20, R. 96.) (Petition, ¶¶ 40-41.)

This component of Whisenhant's judicial bias claim was raised repeatedly at trial (in the form of numerous motions for recusal, all of which were denied) as well as on direct appeal. The Alabama Supreme Court rejected this claim on the grounds that the trial court's "Entebbe precision" comment was merely "a reflection of his knowledge of the case and reflected no personal enmity," and that the record shows "no personal bias on the part of the trial judge

towards the defendant." *Ex parte Whisenhant*, 555 So.2d 235, 238 (Ala. 1989).

When the impartiality of a trial judge is at issue, habeas review must incorporate fundamental concepts of due process, because some errors are so basic as to be structural defects in the trial mechanism. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). "Judicial bias is one of those 'structural defects' that automatically entitles a petitioner for habeas corpus to a new trial." *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *see also Porter v. Singletary*, 49 F.3d 1483, 1487-88 (11th Cir.1995) (due process requires that a defendant be tried before a "fair and impartial tribunal"). In order to establish a due process claim rooted in judicial partiality, a petitioner must show that the judge was actually biased against him. *See Nichols v. Sullivan*, 867 F.2d 1250, 1254 (10th Cir. 1989). To satisfy this burden in the context of bias allegations relating to judicial conduct (as contrasted with extrajudicial conduct), courts have recognized that a judge's remarks or conduct must "demonstrate such pervasive bias or prejudice that it constitutes bias against a party." *Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986).

Clearly, the fact that Judge McRae had previously sentenced Whisenhant to death on two occasions is not indicative of any kind of bias that might preclude him from presiding over the case a third time. In the words of Justice Scalia:

> "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. . . . Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant."

Liteky v. United States, 510 U.S. 540, 550-51, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Based on these principles, the *Liteky* Court held that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . Almost invariably, they are proper grounds for appeal, not for recusal." *Id.* at 555; *see also United States v. Battle*, 235 F. Supp.2d 1301, 1343-44 (N.D. Ga. 2001) ("The mere fact that the Court has carried out its statutory and legal obligations in a manner not preferred by defense counsel does not mean that the judge is biased against the Defendant."). That is precisely the situation here. Judge McRae's prior rulings adverse to Whisenhant were not indicative of hostility or bias,

but were merely the product of knowledge acquired by the trial judge during previous proceedings and the result of the trial judge's discharge of its legal duties. The rulings bear no hallmarks of favoritism or antagonism, and fail to evince deep-seated antagonism that might inhibit fair judgment.

Nor was due process violated by Judge McRae's remark about "Entebbe precision" and petitioner's purported rationality. After all, *Liteky* instructs that opinions formed by the judge on the basis of prior proceedings "do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* at 555. A vivid application of the quantum of antagonism required to render fair judgment impossible is *Wiley v. Wainwright*, 793 F.2d 1190 (11th Cir. 1986), in which a defendant claimed that his due process rights were violated because a lower court judge was biased, based on the judge's comments during a hearing that "[t]his case is another example of the waste of time of people who are guilty as heck" and "I don't see this case going anywhere." *Id.* at 1193 & n.1. The Eleventh Circuit rejected Wiley's due process claim on the grounds that these remarks were made in the context of a judicial proceeding and were based on impressions gleaned from previous hearings, not on any bias or prejudice

harbored prior to institution of the action. *Id.*; *compare Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) (finding the requisite judicial bias to violate due process where trial court stated that "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" in a World War I espionage case against German-American defendants).

The Court has spent many hours poring over transcripts in this case. Although it occasionally exhibits signs of friction between lead defense counsel and the trial judge (who were law school classmates), the record overwhelmingly reflects that all participants in the 1987 trial, including Whisenhant and his counsel, were treated with respect and dignity by Judge McRae. Furthermore, the record does not support the proposition that the trial judge was "so resistant to a fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of [his] rulings or findings." *Liteky*, 510 U.S. at 557-58. In light of this analysis, the Alabama state courts' resolution of this claim on direct appeal was not contrary to clearly established federal law, as determined by the Supreme Court; therefore, habeas relief is inappropriate, pursuant to 28 U.S.C. § 2254(d)(1).

2. The Purported "Clandestine Scheme."

The second component of Whisenhant's judicial bias claim relates to a purported "clandestine scheme" between the trial judge and the prosecutors in 1987 "to paper over a potential error that occurred six years earlier." (Petitioner's Brief, at 53.) The record reflects that, approximately two weeks before the 1987 trial, prosecutor Chris Galanos had *ex parte* contact with Judge McRae regarding two proposed orders relating to pretrial matters. Galanos furnished proposed orders along with a handwritten note stating, in part, that one order "enumerates facts intended to preclude *Ake* error during the guilt stage" and inviting Judge McRae to "[l]et me know what you want to do." (Vol. 36, at 314.)[70] The record further shows that Judge McRae signed a substantially similar version of the proposed order relating to expert funds the following day. (Vol. 19, at 39-40.) This order granted the defense's motion for access to a psychiatrist and authorized up to $2,200 for the defense to hire such an expert.

The note and proposed orders given to the trial judge by Galanos were not served on defense counsel back in 1987, and Whisenhant's defense team did not discover them until October 21, 1996, just three days

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[70] In testimony relating to the Rule 32 proceedings, Galanos acknowledged having passed the note and proposed orders to Judge McRae, and conceded that he did not serve such communications on defense counsel. (Volume 37, Hearing Transcript, at 57-58.)

before the Rule 32 hearing. (Petitioner's Brief, at 55.) Upon renewal of the defense's long-standing motion to recuse based on this new information, Judge McRae granted the motion "out of an abundance of caution . . . despite the fact that there is no legal justification for recusal." (Vol. 36, at 319.) Whisenhant now contends in his Petition that this episode demonstrates that Judge McRae "had become a partisan who could not weigh the scales of justice equally between the contending parties," thereby compromising Whisenhant's rights to due process and fundamental fairness. (Petitioner's Brief, at 57 (citation omitted))

Upon learning this information, petitioner promptly amended his Rule 32 petition to claim judicial bias. (Vol. 36, at 306.) The Rule 32 trial court found this claim to be procedurally barred because it could have been but was not raised at trial and on direct appeal, but proceeded to consider it on the merits in light of Whisenhant's claim of newly discovered evidence. (Vol. 37, at 418-20, 424-25.) In considering the merits of this ground for relief, the trial court concluded that even if *ex parte* communication had occurred, "the result was that counsel for Whisenhant received the money they requested in the motion for access to a psychiatrist." (*Id.* at 425.) As a result, the court found in the alternative that the claim lacks merit. (*Id.*) On appeal, the Alabama Court of Criminal Appeals did

not find that the claim was procedurally barred, but instead considered it on its merits. (Vol. 42, R-44.)[71] In finding that this claim was properly deemed meritless, the Alabama appellate court reasoned as follows:

> "The appellant failed to offer any evidence of personal bias or partiality on the part of Judge McRae. The appellant did not show that the judge knew that the motion was not served on the defense. He also did not show that there was any potential error to be covered up. At the time the prosecutor submitted the proposed order in 1987, Judge McRae's denial of the 1981 motion had already been affirmed on appeal. . . . In addition, the order entered by Judge McRae granted the appellant all of the funds he had sought. Based on the record, Judge Kittrell properly denied the appellant's claim on the merits."

(*Id.* at 6-7.)

After careful review of the entire record in this case, as well as petitioner's forceful arguments relating to the *ex parte* communications (Petitioner's Brief, at 54-63), the Court cannot conclude that Judge

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[71] Based on a fair reading of the Alabama appellate court's opinion, the Court cannot agree with the State that the appellate court "ruled that this claim was procedurally defaulted because it could have been but was not raised on direct appeal." (Answer, ¶ 34(a)) The State's characterization of the Court of Criminal Appeals' treatment of this issue is incorrect.

McRae was actually biased or prejudiced against Whisenhant. Simply put, considering the alleged *ex parte* communications alongside the "Entebbe precision" comment and the two prior death sentences, petitioner has not shown that Judge McRae's judicial conduct "demonstrate[s] such pervasive bias or prejudice that it constitutes bias against a party." *Wiley*, 793 F.2d at 1193. Review of the 1987 transcripts demonstrates that Judge McRae treated both sides in an even-handed and fair manner. That he apparently signed the State's proposed order granting a defense motion without input from the defense on the form of that order simply does not evince the kind of bias or prejudice that rises to the level of a constitutional violation.[72] For these reasons,

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[72] It is telling that the defense does not quarrel with either the order's result (granting a defense motion for expert funds) or its content (as it relates to the 1981 proceedings). Given that the proposed order contained only accurate statements about the availability of insanity evidence to the defense in 1981, and given that the result of the order is favorable to the defense, this purported "clandestine scheme" to submit the proposed order without defense input hardly appears fundamentally unfair. Petitioner's claims of conspiracy and judicial bias would resonate far more if the order resulting from such alleged furtive, illicit behavior (i) had an unfavorable result to the defense, or (ii) misstated facts from previous proceedings in a manner unfavorable to the defense. Under the circumstances, Whisenhant's accusations of a judicial/prosecutorial conspiracy in a smoke-filled backroom are not credible where the "conspiracy"'s object was an unremarkable order that gave the defense exactly what they wanted and made accurate observations about evidence available to the defense in earlier proceedings. Had a "conspiracy" truly been hatched, the Court

(Continued on following page)

the Court is of the opinion that the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. Habeas relief is unwarranted on this claim.

H. Juror Misconduct at 1987 Penalty Phase Trial.

Having addressed claims of both prosecutorial and judicial misconduct, the Court now turns to Whisenhant's claim of juror misconduct at the 1987 penalty phase trial.

1. Facts Relating to Juror Misconduct Claim.

One of the citizens who served on the penalty phase jury in 1987 was a 24-year old Mobilian named Lori Moffatt. (Vol. 24, R. 138; Vol. 30, Moffatt Dep. at 4-5.) At the time of trial, Moffatt was unemployed, having just completed a course of study in nursing at Troy State University. (Vol. 22, R. 330.) She had never taken any courses in psychology. (*Id.*) Moffatt was in

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suspects it would not have been used as a vehicle to grant a defense motion and make uncontroversial observations about evidence available in 1981. If Judge McRae and Galanos had *ex parte* dealings regarding the psychiatrist order, such interactions, without more, are in no way symptomatic of the kind of prejudice, hostility and antagonism required to support a finding of judicial bias.

the initial panel of several dozen prospective jurors called in February 1987. (Vol. 21, at 209.) After acknowledging that she had heard about the case previously (as did many of her fellow panel members), Moffatt was individually questioned about the nature and extent of her knowledge. She stated that a friend had told her that Whisenhant had been found guilty previously; however, when asked whether she knew whether his prior sentence had been death or life without parole, she answered "No, I don't." (Vol. 21, R. 257.) The following day, Moffatt was again interrogated individually concerning her knowledge of the case, at which time she reiterated that a friend had told her about it, and that she had received no information about the case from media outlets. (Vol. 23, R. 606.) Moffatt said that in a telephone conversation several weeks earlier, a friend had asked her if she had heard about "the man who had killed that girl and cut her breast off. . . . I hadn't heard about that." (*Id.*, R. 607.) Moffatt stated that was the full extent of her knowledge of the case. (*Id.*, R. 608.)

Moffatt and her entire venire panel were asked by the trial judge whether any of them had "a family member or a close friend who at any time has received psychiatric, psychological or other mental health treatment." (Vol. 21, R. 272-73.) Neither Moffatt nor any other venire member raised her hand in response. Later in voir dire, a subsection of eight venire members (including Moffatt) was asked by defense counsel whether any of them had "ever

known anybody that's been treated for mental health problems." (Vol. 22, R. 310, 327.) Again, neither Moffatt nor any other venire member responded affirmatively.

Moffatt was ultimately selected as a juror in the 1987 penalty phase trial. At the close of trial, after the jury recommended the death penalty, the defense asked that the jurors be polled. (Vol. 29, RRR. 809.) Moffatt and all of her fellow jurors responded affirmatively when asked whether the verdict read in open court represented their true verdict. (*Id.*)

During the Rule 32 proceedings, a Southern Poverty Law Center investigator named Joe Roy visited Moffatt at her home. Based on information gleaned from that interview, the defense determined that she had failed to disclose in voir dire that her aunt had once spent time at Searcy Hospital for psychological problems. As a result of this revelation, Whisenhant included in his amended Rule 32 petition a claim of juror misconduct, alleging that "Moffatt's failure to disclose crucial information denied Mr. Whisenhant his rights under the Sixth, Eighth and Fourteenth Amendments." (Vol. 36, at 293.) He reasoned that Moffatt's lack of candor prevented the defense from assessing whether she had preconceived notions about mental health or whether she would have used independent knowledge or personal opinion in deciding whether Whisenhant was mentally ill. (*Id.* at 292.)

During the Rule 32 proceedings, Moffatt's deposition was taken. She testified that her mother had four sisters, one of whom was named Dyas. (Vol. 30, Moffatt Dep. at 8.)[73] Moffatt indicated that she had rarely been around Dya [sic] and, that she did not know where Dyas lived or when she had seen Dyas last. (*Id.* at 10.) Moffatt had been told by her mother that Dyas had once been sent to Searcy Hospital because "someone had slipped something in her drink," as a result of which Dyas "kind of flipped out." (*Id.* at 13, 23.) Moffatt had no idea how much time Dyas had spent at Searcy, whether it was a day, a year, or more, or less. (*Id.* at 13-14.) Moffatt indicated that she had only met Dyas "once or twice" in her life. (*Id.* at 14-15.)[74] Her understanding was that Dyas had been hospitalized at Searcy sometime before Moffatt was born, or more than 24 years before the 1987 trial proceedings, when Moffatt's mother was still a teenager. (*Id.* at 39.) According to Moffatt, she did not know Dyas's diagnosis or even whether she had any lingering mental or psychiatric condition of any kind. (*Id.* at 16.) After asking a battery of questions showing that Moffatt knew virtually nothing about

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[73] Moffatt testified that she did not know whether "Dyas" was her aunt's first name, her last name or even a nickname. (*Id.* at 34-35.)

[74] The only occasion that she could recollect was a birthday party for Moffatt's grandmother when Moffatt was approximately 10 years old. (*Id.* at 15-16, 40.) Moffatt did not recognize Dyas at that event, did not speak to her there, and was never told by any family members to stay away from Dyas. (*Id.*)

Dyas, defense counsel inquired as to whether Moffatt thought it strange that she lacked such knowledge. She responded, "No, sir, because she was never around." (*Id.* at 19.) Moffatt made very clear that she generally does not give any thought to Dyas because "she's never around me and I don't know her." (*Id.* at 19.)

Moffatt testified that approximately two weeks before Roy came to her house, she had seen a television program that prompted Moffatt's mother to mention Dyas's hospitalization. (*Id.* at 20.) According to Moffatt, "that made me remember" that Dyas had been sent to Searcy. (*Id.*) In explaining her omission to mention this incident at the 1987 trial, Moffatt stated, "I don't see her every day. So it just don't click. Like somebody says who is your aunt, I don't name Dyas. Not that I'm ashamed of her. I didn't grow up with her and I just don't know her." (Vol. 38, at 22-23.)

In Moffatt's deposition, defense counsel labored mightily in an attempt to expose inconsistencies between what she had previously told Roy and what she was saying during a deposition some 9 years after voir dire. (*Id.* at 24-32.) Despite the convoluted and confusing nature of the questions being asked by two sets of attorneys of a clearly unsophisticated witness who was unrepresented by counsel, the deposition transcript makes plain that Moffatt informed both Roy and her interrogators in 1996 that she had no memory of being asked during jury selection whether any of her relatives had received mental health

treatment. (*Id.* at 24-32.)[75] Moffatt also clearly testified that if such a question was asked (which again she does not remember), the reason she did not mention Dyas is "because I don't know her. She's my aunt, but I just don't – I have never really known her." (*Id.* at 27.) She further explained, "I'm not saying that I didn't know at all in '87, but it didn't reflect back on my mind then because I don't see her." (*Id.* at 38.) Moffatt answered, "No, sir" when asked whether she intentionally withheld information from Judge McRae in 1987. (*Id.* at 41.) She also testified that she had based her verdict solely on the evidence and the trial court's instructions. (*Id.* at 43.)

Based on this evidence, Whisenhant argues that Moffatt's failure to disclose her aunt's illness denied him "an opportunity to assess issues such as whether Ms. Moffat [sic] had preconceived notions about mental health and whether it was likely that she would have used independent knowledge or personal opinion in deciding whether the petitioner was

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[75] The purported "inconsistency" from which petitioner's counsel imputes nefarious intent is that Moffatt stated in her deposition that she did not recall telling the investigator that she had not forgotten about Dyas, while a tape-recording of her conversation with the investigator shows that she said, "I didn't forget about it. I don't recall [the judge] asking me about it." (*Id.* at 27-31.) Based on these responses, as well as responses to various confusing and unclear questions during her deposition, petitioner charges that Moffatt "repeatedly changed her story," suggesting that she perjured herself to cover her tracks. (Petitioner's Brief, at 67.) The Court finds no evidence to support such an accusation.

mentally ill." (Petition, ¶ 46.) Whisenhant flatly accuses Moffatt of lying, insisting that the "only inference" that may be reasonably gleaned from her testimony is that "she deliberately withheld the information about her aunt during the 1987 voir dire" and that her testimony about the television program putting Dyas in her mind again "was obviously nothing but a convenient fiction." (Petitioner's Brief, at 68.)[76]

2. Analysis of Juror Misconduct Claim.

The Rule 32 trial court rejected Whisenhant's claim of juror misconduct on the following two grounds: (a) procedural default, because the court believed this claim could have been raised at trial and on direct appeal; (b) the court's finding that the claim lacked merit based on Moffatt's testimony "that in 1987 she did not have any preconceived notions about mental health or that she used independent knowledge or personal opinion in deciding whether Whisenhant was mentally ill." (Vol. 37, at 417-24.) On appeal, the Alabama Court of Criminal Appeals found that the trial court had inaccurately concluded that there was a procedural bar, but that denial on the

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[76] Whisenhant also attempts to reinforce this claim by asserting that Moffatt was one of many jurors who "admitted in voir dire that is [*sic*] would be 'impossible' for her to render an impartial verdict." (Petitioner's Brief, at 68.) For the reasons discussed *infra*, this argument blatantly mischaracterizes the record and cannot strengthen the juror misconduct claim.

merits was proper. (Vol. 42, R-44, at 5.) In particular, the appellate court reasoned that "[i]t was clear from Moffatt's testimony that her failure to respond was inadvertent and was due to a failure to recollect" and that the evidence showed that "Moffatt's failure to respond did not influence the appellant's case." (*Id.* at 5-6.)

Whisenhant correctly observes that his juror misconduct claim is governed by *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). In *McDonough*, the Supreme Court announced the appropriate standard for juror misconduct claims based on voir dire, as follows:

> "We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."

464 U.S. at 556; *see also United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) (new trial required only where (1) juror failed to answer honestly a material question on voir dire; and (2) a correct response would have provided a valid basis for a challenge for cause); *United States v. Quilca-Carpio*, 118 F.3d 719, 722

(11th Cir. 1997) (similar). Neither of these necessary elements is present here.

The first *McDonough* requirement obliges Whisenhant to show that Moffatt "failed to answer honestly a material question on voir dire." *McDonough*, 464 U.S. at 556. Although it is true that Moffatt did not respond affirmatively to unambiguous voir dire questions inquiring as to whether any of her relatives had been treated for mental problems, there is no evidence that she was dishonest in failing to do so. To the contrary, a fair, reasonable reading of Moffatt's deposition shows that Dyas (a long-lost aunt whom she did not know and had rarely met) simply did not come to mind during the handful of seconds between the time the question was asked and the next question dealing with a different topic. While petitioner goes to great lengths to malign this juror and impugn her credibility, the Court finds it entirely reasonable that Moffatt might not have instantly thought of Dyas in response to these voir dire questions. After all, Moffatt has been in Dyas' presence only once or twice in her life, and does not even think of her as her aunt because she does not know her. Moreover, Dyas's Searcy hospitalization happened before Moffatt was born. Moffatt does not know why Dyas was admitted, how long she remained, what treatment (if any) she received, or what her present mental condition might be. Given these very clear answers, no pernicious, deceptive

motivation can be read into Moffatt's failure to speak up in voir dire.[77]

Taking the analysis deeper, there is no basis for imputing dishonesty to Moffatt. She had no reason to lie. Individualized questioning of Moffatt in voir dire reflected that she had only the most cursory knowledge of this case. Her awareness of her aunt's mental health issues was even more attenuated; in fact, the record shows that Moffatt knows *nothing* about her aunt's present or past mental health status, other than the fact that she was admitted to Searcy more than two decades before the 1987 trial for an unknown time period, for an unknown purpose, arising from an unknown condition when she "flipped out" when "someone put something in her drink." The

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[77] Whisenhant's argument to the contrary hinges on a highly strained, one-sided reading of the deposition transcript that focuses on the word "forgot." (Petitioner's Brief, at 65-68.) At most, the deposition transcript reflects a confused and unsophisticated witness, not a liar, who was barraged by often confusing and unhelpful rapid-fire questions from her interrogators on both sides of this case. Nonetheless, petitioner takes the position that Moffatt must have been lying during the 1987 voir dire and again during the 1996 deposition because she told an investigator at one point that as of 1987 she had not forgotten about her aunt's hospitalization. (*Id.*) The Court cannot accept Whisenhant's premise that if Moffatt had not forgotten about Dyas's existence and condition, then Moffatt must have been dishonest if ancient family history regarding Dyas did not immediately spring to mind during a voir dire session in which Moffatt was asked numerous questions, with only seconds to reflect and respond to each.

record cannot support an inference that Moffatt harbored ill will against Whisenhant or the mentally ill; to the contrary, she plainly testified that she was not ashamed or embarrassed of Dyas, that it was nothing to be embarrassed or ashamed about, that she did not shun Dyas, but that she simply did not know her because Dyas was never around. Despite accusations that she "repeatedly changed her story" and presented "convenient fiction" in her deposition, Whisenhant can only speculate that this juror was dishonest. That is not sufficient. *See Quilca-Carpio*, 118 F.3d at 722 (rejecting *McDonough* claim where it would be speculative to assume that juror was dishonest in voir dire).

Even if the first *McDonough* element were satisfied, Whisenhant's juror misconduct claim would still fail because he cannot show that a correct response by Moffatt in voir dire would have given rise to a challenge for cause. In an attempt to satisfy this requirement, Whisenhant argues that: (1) her dishonesty during voir dire was itself grounds for a challenge for cause; (2) she had a "family history of mental illness" and "strange ide as about the subject"; and (3) further questioning might have helped Whisenhant evaluate her fitness to serve and determine whether "to remove her for cause or to exercise one of [his] peremptory challenges." (Petitioner's Brief, at 70-71.) The first contention improperly collapses the two *McDonough* requirements into one, and is in any event factually unfounded for the reasons discussed *supra*. The second is utterly devoid

of evidentiary support.[77] The third misses the point that Whisenhant has now had an opportunity to evaluate Moffatt's fitness as a juror by taking her deposition, and has been able to identify no theory for a successful cause challenge.[78] Thus, in pursuing his juror misconduct ground for § 2254 relief, petitioner stretches well beyond the boundaries of reasonableness.

In short, Whisenhant is not entitled to habeas relief on this claim because he cannot show that the state appellate court unreasonably made the factual determination in the Rule 32 proceedings that Moffatt's failure to respond was inadvertent, nor can he show that the Alabama courts' denial of his request for a new trial on juror misconduct grounds

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[77] Nothing in Moffatt's deposition shows that her family has a "history of mental illness"; indeed, it is pure conjecture to assume that just because Dyas was admitted to Searcy in the 1960s that she or anyone in Moffatt's family is or was mentally ill. Even more inappropriate is petitioner's contention that Moffatt has "strange ideas" about mental illness. That her mother told Moffatt that the reason for Dyas's hospitalization was that someone put something in her drink does not imply that Moffatt has "strange ideas" about anything. Once again, Whisenhant's counsel vilifies Moffatt by layering supposition atop speculation atop innuendo.

[78] As for Whisenhant's argument that he might have used a peremptory challenge to strike Moffatt had she described Dyas's circumstances, that possibility is irrelevant under *McDonough*, which allows relief only where a correct juror response "would have provided a valid basis for a challenge ***for cause***." *McDonough*, 464 U.S. at 556 (emphasis added).

was contrary to, or involved unreasonable application of, clearly established federal law.

I. Partiality by Jurors at 1987 Penalty Phase Trial.

Whisenhant's ninth habeas claim is that many jurors remained on the panel at the 1987 trial despite acknowledging that it would be "impossible" for them to sit as fair and impartial jurors. (Petition, ¶ 48.) In particular, the Petition asserts that when the trial judge asked the entire first venire panel, as a group, whether it would be "impossible" for them to serve as fair and impartial jurors, "numerous persons . . . acknowledged that it would be impossible for them to be fair and impartial," but were neither excused nor questioned further about their response. (*Id.*) According to Whisenhant, two such venire members – Moffatt and Ben Hawkins – ultimately sat on the jury, such that the trial court's "refusal" to excuse them for cause contravened the principles of *Irvin v. Dowd*, 366 U.S. 717 (1961). (Petitioner's Brief, at 72.)

This claim was not raised at trial or on direct appeal, but was presented for the first time in the Rule 32 proceedings. (Peitioner's [sic] Brief, at 72.) The Rule 32 trial court deemed the claim procedurally barred under Alabama law because Whisenhant had failed to raise it either at trial or on direct appeal. (Vol. 37, at 417-20.) The Alabama Court of Criminal Appeals concluded that the trial court "properly determined that relief was procedurally barred under

Rules 32.2(a)(3) and (5), Ala.R.Crim.App.," as to that claim. (Vol. 42, R-44, at 3.)

Whisenhant now attempts to overcome the effects of this state-law procedural bar by arguing that he can show cause and prejudice for the default. As "cause" for the default, Whisenhant maintains that "defense counsel's failure to object to the trial court's permitting two admittedly biased venire members to serve of [*sic*] the jury constituted ineffective assistance of counsel." (Petitioner's Brief, at 73.) The fundamental problem with this ground for relief – and the attendant argument that his attorneys rendered ineffective assistance by failing to raise it, – is that it egregiously mischaracterizes the record. The events that Whisenhant recites simply did not occur, *i.e.*, it is untrue that "numerous persons" responded affirmatively when asked whether it would be "impossible" for them to be fair and impartial at the 1987 trial.

What *actually* transpired is as follows: Judge McRae asked the entire panel, "Has any member of this jury seen anything about this case in the newspaper or seen or heard anything about this case on television and, if so, please stand." (Vol. 21, R. 206.) He then stated the following:

> "All of you people that are standing . . . , is there any member of this jury who thinks because of the recollection that you have about this case . . . that it would be impossible for you to sit as a fair and impartial juror in this penalty stage of this

> particular case? That is, what you have read, what you have seen and heard on television, would that in any way bias or affect you in any way from rendering a fair and impartial verdict in the case. If you feel that it would, simply raise your hand. All right."

(Vol. 21, R. 206-07.) The record does not reflect that a single juror raised his or her hand. Indeed, Judge McRae proceeded immediately to identify on the record the 33 jurors who had stood *in response to the previous question* (including Moffatt and Hawkins), and to ask each of them to sit down. (*Id.*, R. 207-12.) Thus, the 33 jurors whose names are read in the passages cited by Whisenhant are those who stood in response to the question of whether they had seen or heard anything about the case, not those who raised their hands in response to the "impossible" or "bias" questions. *No* venire members raised their hands in response to these questions.[79]

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[79] This interpretation of these transcript pages is the only one that makes sense. Whisenhant contends that the jurors whose names were read were those who raised their hands in response to the second question, rather than those who stood in response to the first question. However, after each of the 33 jurors' names was read, Judge McRae stated, "you may have a seat." (*Id.*) After telling each of those 33 jurors to sit, Judge McRae did not make any comments directed to "other" standing jurors because no one else was standing. Nor did he differentiate in mentioning each of the 33 jurors' names whether they had raised their hands or not. In short, not a word in the record reflects that any juror raised his or her hand in response to the "bias" question, and the only logical reading of the transcript is

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This Court's reading of the record is reinforced by the follow-up questioning of jurors who had stood previously and had not been removed from the panel on other grounds in the interim. Each of these individuals was asked whether he knew the sentence in the previous trial, and all who knew were struck for cause. (*Id.*, R. 246-64.) Once this process was completed, Judge McRae asked all remaining venire members as a group the following questions:

> "[H]ave any of you heard anything about this case from the news media or any other source that might in any way prevent or impair you from deciding this cased based solely on the law that I instruct you on and the evidence that you hear inside of this courtroom and the exhibits which are authorized to be introduced into evidence? I guess another way to say it even broader than that, and I think it's been said twice but I'll do it again, does anybody know of any reason whatsoever why he or she could not render a fair and impartial verdict in this case based solely upon the evidence and the exhibits authorized to be introduced into evidence?"

(Vol. 21, R. 274-75.) Not a single venire member responded affirmatively. These are exactly the same

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that no one did so. Whisenhant's apparent interpretation that *everyone* who stood for the first question also raised his or her hand for the second is both implausible and bereft of support in the record.

venire members whom petitioner claims had previously volunteered in droves that it was "impossible" for them to serve as jurors because of their bias. Clearly, Whisenhant's reading of the transcript is mistaken and does not accurately reflect the events of February 17, 1987.[80]

In light of the foregoing, there; is no cause to excuse the procedural default of this facially frivolous claim. Trial counsel did not object to dozens of "biased" venire members because no such expressions of bias were ever made. Trial counsel did not demand follow-up questioning of jurors who indicated that it was "impossible" for them to serve fairly and impartially because no jurors so indicated in response to the trial court's bias questions. As a matter of law, it cannot be constitutionally defective performance for

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[80] Any lingering doubts about the accuracy of the Court's reading of the transcript and the misguidedness of Whisenhant's juror bias argument are eradicated by the events of the following day, when Judge McRae allowed extensive individualized questioning of the same venire as to their knowledge of the case. (Vol. 23, R. 569-640.) The two "admittedly biased" jurors, Hawkins and Moffatt, were questioned further by the court and defense counsel, with no hint of the bias that Whisenhant claims they harbored. Hawkins denied knowing the outcome of the 1981 penalty phase trial, then said, "Well, I knew he was up for murder, but I never found out, you know, the verdict or anything like that." (*Id.*, R. 582-83.) Moffatt likewise indicated that she was unaware of the verdict in the 1981 sentencing phase trial, and stated that all she knew was what a friend had told her. (*Id.*, R. 606-08.) Thus, Whisenhant's claim that Hawkins and Moffatt had "expressed bias" against him is counterfactual and misleading.

counsel to fail to object to events that did not happen. This claim is nothing more and nothing less than the product of appellate counsel flagrantly misconstruing the record and substantially overreaching the scope of any colorable claims.

For all of these reasons, the Court concludes that this ground for § 2254 relief is procedurally barred and that Whisenhant has failed to make a showing of cause and prejudice to excuse the default. Habeas relief is unwarranted on this claim.[81]

J. Refusal to Allow Voir Dire of Actual Juror Prejudice at 1987 Trial.

Moving on to Whisenhant's tenth ground for § 2254 relief, he contends that Judge McRae "refused to allow petitioner's counsel to question prospective jurors at the 1987 penalty phase trial to adduce

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[81] The Court understands that petitioner's counsel are endeavoring to raise every claim that might possibly be deemed meritorious in an effort to save their client's life. This is as it should be, and counsel's efforts are laudable. However, counsel do their client a disservice by bringing habeas claims based on counterfactual, hopelessly distorted readings of the record. There is not one scrap of evidence that "two jurors who were admittedly biased against him were allowed to sit on his jury." (Petitioner's Brief, at 73.) It did not happen. Any rational reading of the transcript would have demonstrated to counsel that this argument was predicated on events that never transpired. Counsel's insistence on advancing this baseless claim belies the scrupulous care, preparation and diligence that have been the hallmarks of their defense since the inception of capital murder proceedings against Whisenhant back in 1976.

evidence of actual juror prejudice from the extensive inflammatory pretrial publicity." (Petition, ¶ 50.) Because it was "impossible" for him to demonstrate jurors' actual bias, Whisenhant contends, the voir dire procedure violated his constitutional right to a fair trial under *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931).[82]

The Alabama Supreme Court rejected this claim on direct appeal pursuant to the following reasoning:

> "Having reviewed the record, we agree with the Court of Criminal Appeals 'that the trial court asked all the questions necessary to insure that the jurors would give this appellant a fair and impartial trial.' Those jurors who felt that they could not listen impartially, those who knew of Attorney General Siegelman's press conference, and those who knew that the defendant had received the death penalty in a prior trial were excused from the venire. Therefore, we agree with the Court of Criminal Appeals that the defendant had a fair and impartial jury. . . ."

Ex parte Whisenhant, 555 So.2d 235, 239 (Ala. 1989).

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[82] The State unhelpfully and incorrectly maintains that "Whisenhant did not raise this claim at trial" and "did not raise this claim on direct appeal," but raised it "for the first time in his Rule 32 petition." (Answer, ¶ 38.) Cursory inspection of the record exposes the falsity of this assertion. Indeed, the Rule 32 trial court deemed this very claim procedurally defaulted for the precise reason that it *was* raised on direct appeal. (Vol. 37, at 416-17.)

After careful scrutiny of the 1987 voir dire transcripts, this Court is convinced that the state court's adjudication of this claim on the merits was neither contrary to clearly established federal law, nor based on an unreasonable determination of the facts. All venire members who had any knowledge about the case were subjected to wide-ranging individually sequestered voir dire by the trial court and counsel as to the extent of their knowledge. All panel members who knew the results of the prior sentencing proceeding, or who felt that they could not be fair and impartial because of their knowledge of the case, were dismissed for cause. One large swath of a venire panel was even subjected to individually sequestered voir dire about pretrial publicity twice, just to ensure that defense counsel had sufficient opportunity to interrogate them on the subject. The trial court repeatedly informed defense counsel that they could ask any questions regarding pretrial publicity that they wished. The record reflects that the defense had – and availed itself of – the opportunity to explore in detail the venire's knowledge of the case.[83] Moreover, venire members were asked if,

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[83] Illustrative of the kinds of questions defense counsel asked individually sequestered jurors regarding pretrial publicity were the following: (i) "if you was to tell somebody about this case from what you know about from the news coverage . . . , what would you say?"; (ii) "Have you been reading about this case in the last couple of weeks?"; (iii) "Do you remember reading about [Attorney General Siegelman] in connection with this case in any way?"; (iv) "what's your best judgment as to the sentence that was given when this case was

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based on their knowledge of the case, they felt they could not be fair and impartial, and those who responded affirmatively were dismissed.

It is true that Whisenhant's counsel was not permitted to explore one particular line of questioning. Specifically, the trial judge refused to allow the following question:

> "Based on what you know about this case, what you have read about it, right now if you were selected to sit as a juror and decide this case, what would be your attitude about the proper punishment in this case, life without parole or death?"

(Vol. 22, R. 448-49.)[84] This is the only example identified by Whisenhant of a specific question that

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tried before?"; (v) "If you were telling your next door neighbor or some other people about this case, how would you describe it?"; (vi) "What was he supposed to have done, from what you heard?". (Vol. 22, R. 451, 453, 456, 467, 476, 498.) These types of questions could elicit not only what the jurors had heard, but also how publicity had affected their attitudes about the case.

[84] Although he rejected that formulation of question raised by defense counsel, Judge McRae immediately followed up with each venire member to whom defense counsel wished to pose such a question by inquiring as to whether that individual would weigh the aggravating and mitigating circumstances and follow the law as charged by the court, irrespective of prior knowledge. (Vol. 22, R. 449; Vol. 23, R. 514.) This Court believes the trial court's rephrasing and follow-up of the objected-to query was sufficient to provide all reasonably necessary information to Whisenhant.

he was not permitted to ask.[85] The Court concludes that it was not a constitutional deprivation for Judge McRae to sustain an objection to this form of question. In essence, the objected-to line of questioning sought an anticipatory verdict from venire members, an off-the-cuff prediction as to what verdict they might return. The Court agrees that this formulation was improper, and is unaware of any Supreme Court precedent guaranteeing Whisenhant a constitutional right to request a forecast from venire members as to how they might decide if they had to return a verdict that very minute, without having heard one shred of evidence. What he did have a constitutional right to know was what these venire members knew about this case from pretrial publicity and whether they could be fair and impartial, regardless of their knowledge. The extensive questioning allowed on these points was more than adequate to safeguard Whisenhant's right to ferret out potential bias, and nothing in the Petition or brief

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[85] Petitioner represents that "[o]ver and over again, Whisenhant's attorney attempted to ask or to persuade the court to ask" questions regarding how their exposure to pretrial publicity affected their judgment. (Petitioner's Brief at 84.) From the Court's review of the literally hundreds of pages of voir dire devoted to pretrial publicity at the 1987 trial, however, it appears that only one line of questioning was foreclosed to Whisenhant regarding pretrial publicity, and that each time defense counsel tried to raise it, the trial judge denied it, then essentially rephrased the question to elicit relevant information.

persuades the Court that the Constitution requires anything more.[86]

For all of the foregoing reasons, Whisenhant is not entitled to habeas relief from the Alabama state courts' ruling that the 1987 voir dire process was sufficient to insure that Whisenhant would receive a fair and impartial jury not infected by inflammatory, sensationalized pretrial publicity.

K. Trial Court's Refusal to Charge Jury Regarding Non-Statutory Mitigating Circumstances.

Petitioner next asserts that the trial court violated the constitutional principles articulated in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57

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[86] Petitioner's counsel again distorts the record in connection with this claim. Their marquee argument, reiterated in several places in the brief, relates to exchanges between defense counsel and Judge McRae in which the latter appeared to rule that Whisenhant could not ask individual jurors what they knew about pretrial publicity and how it had affected them. (Petitioner's Brief, at 75, 83.) Irrespective of that colloquy, however, the record reflects that Judge McRae did in fact allow extensive individual voir dire in just these areas, with one venire being re-called a second time for further individual questioning. Petitioner's emphasis on Judge McRae's preliminary rulings at the outset of voir dire does not reflect the reality of what actually transpired, when the trial judge modified his announced approach substantially and to the defense's benefit. As such, petitioner's argument emphasizing these preliminary rulings – without mentioning how voir dire actually unfolded – is misleading.

L.Ed.2d 973 (1978) by refusing to give his requested jury charge #10 relating to non-statutory mitigating circumstances at the 1987 trial. (Petition, ¶ 53.) According to Whisenhant, "[b]y specifically describing each statutory mitigating circumstance but only vaguely hinting at possible non-statutory mitigating circumstances, the trial court erroneously implied to the jury that non-statutory mitigating circumstances merited less attention and deserved less weight than their statutory counterparts." (*Id.*) The trial judge declined to read the jury a proposed instruction from defense counsel that would specifically enumerate five non-statutory mitigating circumstances, including Whisenhant's psychological and emotional problems, his traumatic family background, his assistance to law enforcement, his aid to the victim's family and his good adjustment to life in prison. (Vol. 19, at 157.) In refusing this charge #10, Judge McRae reasoned that it was adequately encompassed in the general charge. (Vol. 28, R. 682.) The general charge read to the jury included instructions that the jury "may also consider as a mitigating circumstance, any aspect of the Defendant's character and life, and any of the circumstances of the capital offense which tend to indicate that the Defendant should not be sentenced to death." (Vol. 29, RRR. 787.) The instruction proceeded to identify as examples of non-statutory mitigating circumstances "anything that happened to the Defendant before he committed the capital offense that indicates or tends to indicate that he should not be sentenced to death"; "any conduct or behavior of the Defendant since the time of the

capital offense which indicates or tends to indicate that he should not be sentenced to death"; and "any aspect of the Defendant's mental or emotional condition at the time of the crime which indicates or tends to indicate that the Defendant should be sentenced to life imprisonment without parole instead of death." (*Id.*, RRR. 787-88.) Judge McRae also cautioned the jurors that mitigating circumstances need not be included in the list provided in order to be properly considered. (*Id.*)

Whisenhant objected to the denial of charge #10 on direct appeal. The Alabama Supreme Court affirmed the trial court's decision, finding that the trial judge's instructions were adequate. *Ex parte Whisenhant*, 555 So.2d 235, 243 (Ala. 1989). Whisenhant now renews that objection.

Upon review, the Court concludes that Judge McRae did not violate Whisenhant's constitutional rights by failing to read a proposed list of non-statutory mitigating circumstances to the jury. The Eleventh Circuit definitively rejected an argument akin to this in *Tucker v. Zant*, 724 F.2d 882 (11th Cir. 1984), explaining as follows:

> "Nothing in any of our cases suggests that such explicit enumeration of possible mitigating factors is required. . . . [A] requirement that the trial court list specific mitigating factors would be inharmonious with the Supreme Court's admonitions that the sentencer be free to consider any relevant mitigating factor. . . . The sort of

> specificity Tucker seeks would doubtless bring complaints from other petitioners that the trial court had unduly narrowed the focus of the jury's consideration. Defendant's counsel is, of course, free to direct the jury's attention to specific mitigating factors, but the Constitution does not oblige the trial court to do so."

Id. at 892.

The Eleventh Circuit's reasoning in *Tucker* is both compelling and inescapable. Moreover, Whisenhant's theory that Judge McRae's instructions somehow cheapened or marginalized non-statutory mitigating factors by telegraphing that those circumstances "merited less attention and deserved less weight than their statutory counterparts" (Petitioner's Brief at 90) is simply not a credible inference from those instructions. The trial court advised the jury that they could consider a wide range of non-statutory mitigating factors, including broad categories encompassing the specific factors identified by Whisenhant, as well as a "catch-all" authorizing consideration of any other mitigating factors they wished. Nothing in the instructions downplayed the importance of non-statutory mitigating factors or implied that they were somehow less worthy of consideration than others. Petitioner had no constitutional right to have the trial judge read a list of non-statutory mitigating factors to the jury, so long as mitigation was fully and adequately explained. It was.

In short, the Court has no hesitation in finding that § 2254 relief is unwarranted on this claim, inasmuch as Alabama state courts' determination of the issue was not contrary to clearly established federal law. *See generally High v. Kemp*, 819 F.2d 988, 991 (11th Cir. 1987) (standard of review for challenge of jury instructions on mitigation is whether any reasonable juror could have failed to understand the instructions and the role of mitigation); *Peek v. Kemp*, 784 F.2d 1479, 1494 (11th Cir. 1986) (Constitution requires no reasonable possibility that a juror will misunderstand the meaning and function of mitigating circumstances, but does not require use of particular words or phrases in instructing jury on such meaning and function).

L. Testimony of Victim's Mother During 1987 Penalty Phase Trial.

In his Petition, Whisenhant asserts that his constitutional rights were violated by testimony received by the trial judge in 1987 after the jury had rendered its recommendation. Specifically, the Petition objects to the testimony of Payton's mother that her daughter had expressed fear for her life after another convenience clerk slaying in 1975. (Petition, ¶¶ 55-59.) In his supporting brief, petitioner states without amplification or explanation that he is withdrawing this claim. (Petitioner's Brief, at 3 n.1 & 91.) In accordance with Whisenhant's unequivocal wishes, the Court deems his claim related to the

victim's mother's testimony at the 1987 proceeding to be withdrawn.

M. Ineffective Assistance of Counsel.

1. Nature of Ineffective Assistance Claims.

As his thirteenth ground for relief, Whisenhant seeks a writ of habeas corpus on the ground that his counsel furnished him with constitutionally ineffective legal representation in connection with the 1981 and 1987 trials and direct appeals. The Petition identifies the following five instances of purported ineffective assistance of counsel: (a) failure to present evidence supporting Whisenhant's insanity defense at the 1981 guilt phase trial; (b) failure to raise a *Batson* challenge to racially discriminatory peremptory strikes exercised by the State at the 1981 and 1987 trials; (c) failure to object to prosecutorial misconduct during the 1981 guilt phase trial; (d) failure to object to improper jury instructions during the 1981 guilt phase trial; and (e) inadequate penalty phase voir dire at the 1987 trial in failing to follow up on jurors' admission that it was "impossible" to be impartial. (Petition, ¶¶ 60-71.) Whisenhant's brief also asserts that counsel furnished ineffective assistance at the 1987 trial by failing to raise *Ring* objections, and withdraws without explanation the ineffective assistance claim predicated on prosecutorial misconduct (item (c), *supra*). (Petitioner's Brief, at 3 n.1, 107, 109.)

Of the five remaining ineffective assistance claims, four (with the exception of the *Ring* claim) were raised in Whisenhant's Rule 32 petition. (Vol. 36, at 301-03.)[87] The Alabama Court of Criminal Appeals rejected all of these asserted bases for ineffective assistance of counsel. With regard to the insanity defense, the Alabama court concluded that trial counsel had made a reasonable strategic decision not to present evidence of insanity at the 1981 trial. (Vol. 42, R-44, at 8.) As for the Batson challenge, the Alabama court opined that counsel was not unreasonable for failing to predict changes in the law. (*Id.*) With regard to the jury instructions claim, the Rule 32 appellate court found that counsel was not ineffective for failing to object because the instructions in question were not improper. (*Id.* at 9.) Finally, the Alabama court found no ineffective assistance of counsel as to the penalty phase voir dire because the record did not reflect that further challenge or questioning was warranted. (*Id.*)

2. Strickland *Standard.*

Under well-established law, ineffective assistance claims require a showing that "counsel's conduct so

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[87] Indeed, Whisenhant's Amended Rule 32 Petition identified no fewer than 14 episodes of alleged ineffective assistance of counsel. (*Id.*) As only four of those grounds have been preserved here, the Court will not consider or comment on those claims of ineffective assistance raised in the Rule 32 petition but not presented in the § 2254 Petition.

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Haliburton v. Secretary for Dep't of Corrections*, 342 F.3d 1233, 1242-43 (11th Cir. 2003) (citation omitted). Stated differently, "to establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and counsel's performance prejudiced the defense." *Conklin v. Schofield*, 366 F.3d 1191, 1201 (11th Cir. 2004). Under the familiar *Strickland v. Washington* test, courts first consider whether counsel's performance was constitutionally deficient. This determination "depends upon the totality of the circumstances [and is] shaped by the rules and presumptions set down in *Strickland* . . . and its progeny." *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir.1995) (en banc). One such strong presumption is "that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 1511-12 (citation omitted). Another is that "counsel made significant decisions in the exercise of reasonable professional judgment." *Haliburton*, 342 F.3d at 1243 (citation omitted). These presumptions are even stronger when examining the performance of experienced counsel. *Id.* The totality of the circumstances test turns on "whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial," rather than asking what a hypothetical "good lawyer" would have done. *Waters*, 46 F.3d at 1512 (citation omitted). The question is whether any competent counsel would have taken the challenged action, not whether it was

the best possible course of action that a skilled attorney might have selected. *Haliburton*, 342 F.3d at 1243.

In addition to satisfying the deficient performance prong, a defendant advancing an ineffective assistance claim must also show prejudice, which requires a showing that counsel's errors "were so serious as to deprive the defendant of a fair trial." *Haliburton*, 342 F.3d at 1243 (citation omitted).

3. Disposition of Claims Relating to Batson *Challenge, Jury Instructions, Penalty Phase Voir Dire, and* Ring *Challenge.*

As discussed *supra*, Whisenhant endeavored to use ineffective assistance arguments to establish cause for the state-law procedural default arising from his failure to raise certain claims at trial or on direct appeal. In particular, petitioner sought to overcome the procedural default of his *Batson* claim for alleged race-based peremptory challenges, his *Sandstrom* claim for allegedly improper jury instructions, and his claim that numerous jurors were biased by contending that his counsel was constitutionally inadequate for failing to raise such objections earlier. The Court has already written extensively, *supra*, to Whisenhant's ineffective assistance claims with respect to each of these three grounds for relief. As to each of those claims, the Court has concluded that Whisenhant did not receive constitutionally

ineffective assistance from his attorneys. Without reiterating the reasoning behind those determinations here, the Court simply notes that Whisenhant has failed to meet either prong of the *Strickland* test with respect to his ineffective assistance claims relating to *Batson* challenges, jury instructions, and voir dire concerning juror bias.

As for the contention that counsel was ineffective for failing to raise a *Ring v. Arizona* challenge at his 1987 trial, that claim fails for two reasons.[88] First, *Ring* was decided 15 years after the 1987 trial. As a matter of law, counsel cannot be ineffective for failing to predict changes in the law. *See United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001) (emphatically rejecting proposition that attorney's failure to anticipate a change in the law constitutes ineffective assistance). Second, a *Ring* objection would have been unavailing to Whisenhant even if counsel had raised it in 1987, simply because the Supreme Court has held that *Ring* cannot be applied

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[88] The Court harbors significant reservations as to whether this claim is even properly before it. *See, e.g., Peoples v. Campbell*, 377 F.3d 1208, 1239 (11th Cir. 2004) (for instances of ineffective assistance not presented to the state courts, a habeas petitioner must demonstrate both cause and prejudice to excuse procedural default, or else those claims are barred from federal review). Nonetheless, the Court will assume (without deciding) that ineffective assistance of counsel predicated on *Ring* is properly raised, even though (i) it was never presented to the state courts, and (ii) it was not set forth in the body of the Petition, but was raised for the first time in petitioner's brief filed some 11 months after the amended, corrected Petition.

retroactively. *See infra.* As such, any *Ring* objection raised in 1987 would not have changed the outcome of the 1987 trial, much less entitled Whisenhant to relief in his collateral attack on his conviction and sentence in federal court.

4. Failure to Present Evidence of Insanity at 1981 Guilt Phase Trial.

The only remaining ineffective assistance claim is Whisenhant's contention that his 1981 trial counsel committed error of constitutional proportions by resting without presenting evidence of his mental or emotional condition. (Petition, ¶ 62.) Whisenhant complains that his trial lawyers in 1981 (affiliated with the same Southern Poverty Law Center that represents him today) "sat on their hands" when it was "patently unreasonable" not to present evidence in support of that defense. (Petitioner's Brief, at 94-95.)

Of course, there was a reason why Whisenhant's lawyers failed to present the "virtual mountain of readily available evidence that would have supported an insanity defense." (Petitioner's Brief at 102.) As petitioner himself acknowledges, his attorneys "were not naive." (*Id.*) This was a conscious, intentional strategy calculated to preserve and exploit what defense counsel believed to be "locked in error" resulting from Judge McRae's denial of the defense motion for funds to retain a psychiatrist. (Vol. 38, at 217.) Lead defense counsel Morris Dees explained in

his Rule 32 deposition that the defense "strategy" from the beginning was to secure built-in error "as we wrote in so many of our trial manuals on death penalty cases" to prolong the case over an extended period of time, allowing emotions of the victim, community and prosecutors to cool in hopes of obtaining a sentence of less than death. (Vol. 38, at 235-36.) Once Dees objected to the perceived *Ake* error at the 1981 trial, he left the issue undisturbed because there "[w]asn't any need of going further." (*Id.* at 236.) Having embedded perceived "locked-in error" into the record, defense counsel did not wish to take any action that might cure the defect on appeal. Presentation of the "mountain of evidence" of insanity in defense counsel's possession might have cured the perceived *Ake* error and undercut this basis for seeking reversal, thereby thwarting defense plans to prolong the case as much as possible. As such, the decision not to present evidence of insanity at the 1981 trial was a carefully considered tactic by sophisticated defense counsel to serve a definite strategic purpose.

Where, as here, experienced trial counsel makes a strategy decision, no ineffective assistance of counsel claim will lie unless the decision itself was unreasonable. *See, e.g., Collier v. Turpin*, 177 F.3d 1184, 1199 (11th Cir. 1999) (for ineffective assistance claims relating to litigation tactics, the reasonableness of a tactic is a question of law decided by reference to all the circumstances); *Haliburton*, 342 F.3d at 1243 (following a particular line of defense is

a matter of strategy and is not ineffective unless the chosen course, in itself, was unreasonable). Indeed, "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.1995) (en banc).

After careful review of the record, the Court finds that Whisenhant has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy," as required to support an ineffective assistance claim on that basis. *Darden v. Wainwright*, 477 U.S. 168, 186-87 (1986) (citations omitted). There is no serious room for debate that the calculated choice not to present evidence of insanity, so as to preserve perceived reversible error, falls well within the wide range of reasonable professional assistance and can in no way be deemed unreasonable.[89]

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[89] This conclusion is all the more compelling given trial counsel's high degree of expertise. Petitioner concedes that his lawyers in the 1981 trial were "experienced capital litigation attorneys." (Petitioner's Brief, at 92.) In his Rule 32 deposition, lead defense counsel Morris Dees testified that he had personally represented approximately 3/4 of the roughly 50 capital defendants handled by the Southern Poverty Law Center. (Vol. 38, at 191-93.) Dees further testified that the Center had published manuals teaching capital defense attorneys how to try capital cases at the guilt and penalty phases, how to conduct jury selection in capital cases, how to handle capital appeals and the like. (*Id.*) The strategy of not

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Therefore, under the *Strickland* standard of review for ineffective assistance claims, this collateral attack on Whisenhant's conviction and sentence must be denied.

More generally, given petitioner's denunciation of his counsel's efforts in 1981 and 1987, the Court feels compelled to comment on the adequacy of Whisenhant's representation at trial, on direct appeal, and on collateral attack by the Southern Poverty Law Center. After painstaking review of the trial and appellate records, it is this Court's firm conviction that if the conscientious, diligent and expert legal assistance furnished to Whisenhant flunks the constitutional standard, then no capital defendant in the State of Alabama has ever received the constitutionally guaranteed effective assistance of counsel. Indeed, many state habeas defendants who come before this Court would be most fortunate indeed to be saddled with counsel as "ineffective" as Whisenhant's lawyers, who have been ardent, meticulous, and indefatigable advocates for their client's interests from the outset of these proceedings to the present Counsel's ineffective assistance charges, while laudable for their selfless self-abasement for the benefit of a client facing the death penalty, raise the constitutional bar for effective assistance far above that which is reasonably

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disturbing perceived built-in error was apparently a cornerstone of those manuals.

attainable. They would also have the Court ignore the many rational (and often cunning and sophisticated) strategic decisions made by defense counsel along the way, simply because those stratagems backfired or otherwise failed to yield dividends. The constitutional right to effective assistance of counsel does not encompass a right to counsel whose calculated risks always pay off and whose efforts to engraft reversible error into the trial record always succeed.

N. Violation of Ring v. Arizona.

The fourteenth and final claim asserted in the Petition is that the trial judge's factual determinations as to the existence of aggravating circumstances and the relative weights of aggravating and mitigating circumstances violated the tenets of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), a case decided many years after Whisenhant's conviction and sentence became final. "In *Ring*, the Supreme Court held that a jury, and not a judge, must make all findings of fact, including aggravating factors, that render someone eligible for the death penalty." *Sibley v. Culliver*, 377 F.3d 1196, 1208 (11th Cir. 2004); *Ring*, 536 U.S. at 609 ("a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty").

Antecedent to reaching the merits of petitioner's *Ring* claim, the Court must first consider whether *Ring* is retroactively applicable to this case. *See*

Nutter v. White, 39 F.3d 1154, 1157 (11th Cir. 1994) (explaining that reaching merits of constitutional issues in habeas petitions before Addressing retroactivity is "not a favored practice" because "[b]y addressing the retroactivity issue first, courts avoid unnecessarily deckling constitutional questions"). Obviously, if *Ring* is not retroactive, then Whisenhant cannot rely on the new rule therein for purposes of the instant habeas petition.

Earlier this year, the Supreme Court unequivocally ended the vigorous debate as to the retroactive impact of *Ring* by declaring that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, ___ U.S. ___, 124 S.Ct. 2519, ___, 159 L.Ed.2d 442 (2004).[90] In *Summerlin*'s wake, the Eleventh Circuit expressly affirmed that "a petitioner may not appeal a conviction or bring a habeas attack based on *Ring* violations that occurred before *Ring* was handed down." *Sibley*, 377 F.3d at 1208. In light of this unequivocal precedent, the Court finds that Whisenhant's claim of *Ring* error is not cognizable because his case was already final on direct review before *Ring* was decided.

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[90] The *Summerlin* decision was consistent with Eleventh Circuit jurisprudence on the subject. *See Turner v. Crosby*, 339 F.3d 1247, 1286 (11th Cir. 2003) (declaring that *Ring* "does not apply retroactively on collateral review in federal court").

V. Evidentiary Hearing.

In his Petition, Whisenhant requests an evidentiary hearing "at which additional proof may be offered supporting the allegations set forth in this petition." (Petition, at 36.) However, nowhere in the Petition or supporting brief does Whisenhant identify any facts that cannot be adduced without the aid of an evidentiary hearing, nor does he explain how an evidentiary hearing would be necessary or helpful to him in proving his claims.

A habeas petitioner is entitled to an evidentiary hearing if he alleges facts that, if proven, would entitle him to relief. *Smith v. Singletary*, 170 F.3d 1051, 1053 (11th Cir. 1999); *Futch v. Dugger*, 874 F.2d 1483, 1485 (11th Cir. 1989). However, no hearing is required if it can be conclusively determined from the record that the petitioner's claims lack merit. *See Smith*, 170 F.3d at 1054. As the Eleventh Circuit has explained, a habeas petitioner seeking an evidentiary hearing must establish two elements: (1) a material fact pertaining to his federal constitutional claim was not adequately developed at the state court hearing; and (2) the failure to develop that material fact at the state proceeding was not attributable to petitioner's inexcusable neglect or deliberate bypass. *See Tucker v. Zant*, 724 F.2d 882, 897-98 (11th Cir.1984). "This standard requires habeas petitioners to point to specific facts, development of which would be material to a particular claim." *Id.* at 898. Petitioner has failed to make the requisite showing under any of

these standards; therefore, his request for an evidentiary hearing is **denied**.

VI. Conclusion.

For all of the foregoing reasons, Whisenhant's Amended and Corrected Petition for Writ of Habeas Corpus by a Prisoner in State Custody (doc. 6) is **denied**.

DONE and **ORDERED** this 20th day of October, 2004.

/s/ WILLIAM H. STEELE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15810-P

THOMAS WARREN WHISENHANT,

Petitioner-Appellant,

versus

RICHARD F. ALLEN,
Commissioner, Alabama
Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama

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(Filed Apr. 20, 2009)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch
UNITED STATES CIRCUIT
JUDGE

2/11

Judge:

Attached are two proposed orders in Thiombiant

drafted by Lucas for your consideration.

The one relating to Lucas is a psychiatrist

examination form intended to preclude Lucas seeing

during the guilt stage, but I am not sufficiently

familiar with the facts to determine the accuracy

of the order.

Let me know what you want to do.

BEST AVAILABLE COPY

Proposed Order re D's Motion for Access to a Psychiatrist

ORDER

The Court has read and considered "Defendant's Motion for Access to a Psychiatrist," and the related documents that have been filed. The Court is convinced that Defendant is not entitled to have that motion granted.

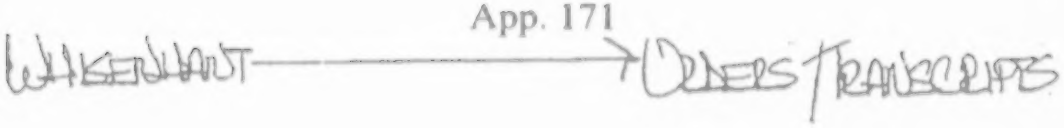
Defendant presented abundant psychiatric evidence at the first trial and the same evidence was available to him at the second trial and is still available to him. Had he desired to do so, Defendant could have read the psychiatric testimony from the first trial into the record before the jury at the second trial, and he could also do so now. The Defendant also could have subpoenaed at least one of his expert psychiatric witnesses to present live testimony at his second trial, and he can do so now. Dr. Claude Brown was a member of the Lunacy Commission, he testified on behalf of the Defendant at the first trial, and he was within the jurisdiction of the Court at the time of the second trial, and he still is. Dr. Brown has previously testified that he would obey a subpoena to testify again in this case.

Furthermore, Defendant is represented by Morris Dees, the Executive Director and Chief Trial Counsel of the Southern Poverty Law Center. In view of all the circumstances, the Court is convinced that ~~this~~ non-profit law center could easily fund any and all psychiatric assistance that Defendant and his counsel thought necessary. The failure to do so at

the second trial, and the professed unwillingness to do so now, can only be part of a litigation tactic.

Nonetheless, to avoid any further question, and to simply put an end to the matter, the Court is going to grant Defendant's motion in part. The Court will allow Defendant a reasonable sum of money, not to exceed $2,000, plus reasonable expenses, to hire ~~Dr. Tenay to serve as~~ an independent psychiatric expert to assist the Defendant in any way he and his counsel see fit. All payments to ~~Dr. Tenay~~ will be made after he has rendered his services and will be subject to review for reasonableness. ~~The Court will not grant the Defendant any funds to employ Dr. Brown.~~ However, the Court will enforce a subpoena to Dr. Brown and will see that he attends trial and testifies, if Defendant and his counsel desire that he do so.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED, that "Defendant's Motion for Access to a Psychiatrist," is ~~denied, except that the part requesting funds to hire Dr. Tenay and pay his expenses is granted~~ subject to a limitation of reasonableness and not to exceed $2,000 in fees and a reasonable amount in expenses, the actual amount paid to be reviewed by the Court in advance of payment.



Cl. w/ Ed
Re: unsigned
orders.

143 (2)

No. 09-220

Supreme Court, U.S.
FILED
OCT 15 2009
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS WARREN WHISENHANT,

Petitioner,

v.

RICHARD ALLEN, *Commissioner of the Alabama Department of Corrections*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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October 21, 2009

CAPITAL CASE

QUESTION PRESENTED

(Rephrased)

Should this Court grant certiorari to review whether the Court of Appeals correctly determined that the Alabama courts' denial of Whisenhant's claim of judicial bias did not violate 28 U.S.C. § 2254(d) where Whisenhant's sole claim is that he was entitled to relief based on the probability of actual bias?

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OPINIONS BELOW

The United States District Court for the Southern District of Alabama issued an order denying all habeas relief. (Pet. App. 28-165) The United States Court of Appeals for the Eleventh Circuit affirmed. Whisenhant v. Allen, 556 F.3d 1198 (11th. Cir. 2009); (Pet. App. 1-27) Whisenhant's petition for rehearing and his petition for rehearing en banc were denied. (Pet. App. 166-167)

JURISDICTION

The Respondent does not dispute Whisenhant's statement of jurisdiction. (Pet. 1-2)

CONSTITUTIONAL PROVISIONS INVOLVED

Whisenhant accurately identifies and sets forth the text of the Fourteenth Amendment to the United States Constitution, but that amendment was not violated in this case.

STATEMENT OF THE CASE

Petitioner Thomas Whisenhant attempts to stretch the Court's freshly-minted "probability of actual bias" recusal standard to the limits. Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252, 2263 (2009). Whisenhant argues that the Alabama state courts wrongly failed to find a probability that his trial judge was biased based solely on the judge issuing an order *granting* Whisenhant's motion for expert funding—an order that was drafted by the prosecution. This claim is unworthy of certiorari review for two reasons. First, Caperton certainly does not stretch that far. Second, and perhaps more clearly, Whisenhant's claim arises from the denial of federal habeas relief under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). See 28 U.S.C. § 2254. Even if Capterton reached the facts of this case (and it does not), Caperton was not "clearly established" law at the time the state court decision. See 28 U.S.C. § 2254(d) (1). Thus, habeas relief is clearly foreclosed.

A. Facts Concerning The Crime

On the night of October 16, 1976, Cheryl Lynn Payton was working alone at a convenience store in Theodore, Alabama. Vol. 24, R. 182-191. Sometime before 10:00 p.m. that night, Whisenhant entered the convenience store with a gun and forced Mrs. Payton to walk out of the store and get into his pickup truck. Vol. 25, R. 77-80. Whisenhant drove Mrs. Payton to a remote area where he raped her in the front seat of the truck, then led her into the woods at gunpoint and shot her once in the head, killing her. Vol. 25, R. 45, 61, 81-82.

The following day, Whisenhant returned to the location of Payton's body, but left when he was accosted by some boys. Vol. 24, R. 201-06, Vol. 25, R. 77-80. The next day, Whisenhant returned to the location of the body and moved it approximately 60 feet so that it would more likely be found. Vol. 25, R. 77-80. On one or both of these occasions, Whisenhant mutilated Payton's body, using a knife to cut the left breast and abdomen, as well as the vaginal area. Vol. 25, R. 32, 46-47, 55, 64-65, 80, 85.

On the second occasion when Whisenhant returned to Payton's body, he was seen by a local farmer who also alerted the police that he had discovered a body. Vol. 24, R. 222, 225-27, Vol. 25, R. 244. Still in the area when the police arrived on the scene, Whisenhant tried to escape in his pickup truck, but was apprehended after a high-speed chase. Vol. 25, R. 245-256. Whisenhant eventually abandoned his truck and retreated into the woods. Vol. 25, R. 251. While hiding there, his wife was brought to the scene to communicate with him by a police loudspeaker. Vol. 25, R. 254. Upon hearing her voice, Whisenhant yelled, "I've done everything they said I did," and indicated that rather than surrender the police would have to kill him. Vol. 25, R. 254-55.

After being taken into custody, Whisenhant confessed to the rape, murder, and mutilation of Payton. Vol. 25, R. 24-91. He admitted that if someone had walked into the store during the course of the crime he would have left. Vol. 25, R. 90. He also confessed to murdering two other female convenience store clerks - one of whom he admitted to mutilating in the same fashion as he did Payton – in the preceding 12 months. Vol. 25, R. 24-91.

B. State Court Proceedings

Whisenhant was originally convicted and sentenced to death in 1977 for the rape/murder of Cheryl Payton. Vol. 9 at 1745-49. However, his conviction was reversed because the prosecutor engaged in improper closing argument by suggesting that Whisenhant would be released from custody if he were found not guilty by reason of insanity and because of a fatal variance between the indictment and the judgment. Whisenhant v. State, 370 So. 2d 1080, 1097-1102 (Ala. Crim. App. 1979).

In 1981, Whisenhant was tried and again convicted and sentenced to death. Vol. 12 at 103-07. This second conviction was affirmed by the Alabama Court of Criminal Appeals, but the sentence was reversed due to an improper remark during the prosecutor's penalty phase opening statement. Whisenhant v. State, 482 So. 2d 1225, 1239-40 (Ala. Crim. App. 1982). After cross petitions for certiorari were granted, the Alabama Supreme Court remanded the case for a determination of whether the penalty phase error was harmless. Ex parte Whisenhant, 482 So. 2d 1241 (Ala. 1983). On remand, the Court of Criminal Appeals held that the error was harmless and affirmed the death sentence. Whisenhant v. State, 482 So. 2d 1246 (Ala. Crim. App. 1983) The Alabama Supreme Court, however, determined that the error was not harmless and remanded for a new penalty phase trial. Ex parte Whisenhant, 482 So. 2d 1247 (Ala. 1984).

After remand, in 1987, Whisenhant received another penalty phase trial, and after a jury recommendation of death the trial judge sentenced Whisenhant to death. Vol. 19 at 168-76. The Court

of Criminal Appeals and the Alabama Supreme Court affirmed the death sentence. Whisenhant v. State, 555 So. 2d 219 (Ala. Crim. App. 1988), aff'd, Ex parte Whisenhant, 555 So. 2d 235 (Ala. 1989). The United States Supreme Court denied certiorari. Whisenhant v. Alabama, 496 U.S. 943 (1990).

Whisenhant then commenced post-conviction proceedings in state court by filing a Rule 32 petition. Vol. 35 at 31-52. In one of his claims, Whisenhant alleged that "the trial judge's bias and appearance of partiality at the time of the 1987 penalty phase hearing violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution..." After an evidentiary hearing, the Rule 32 trial court denied the petition. Vol. 37, R. 403-89. The Alabama Court of Criminal Appeals entered an unpublished memorandum opinion affirming the denial of the Rule 32 petition. Vol. 42, R-44. Specifically rejecting Whisenhant's claim of judicial bias on the merits, that court held that Whisenhant failed to offer any evidence of personal bias or partiality on the part of the trial judge. The Alabama Supreme Court denied certiorari. Vol. 43, R-49.

C. Facts Relating to Whisenhant's Claim That The Trial Judge Was Biased.

The facts underlying this claim relate to a motion filed before the 1987 penalty phase requesting funds to hire a psychiatrist. Vol. 19, 33-38. Prior to trial, defense counsel filed numerous motions with Judge Ferrill McRae[1] including a motion for access to a psychiatrist. Vol. 19, at 33-38. The motion is

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[1] Judge McRae presided over all three of Whisenhant's trials.

virtually identical to the motion for funds defense counsel filed before the 1981 trial. The motion mentioned the two psychiatrists that had performed an evaluation before the 1977 trial, Dr. Claude Brown and Dr. Emanuel Tanay. Id. The motion requested $2,200 for Dr. Brown and $2,000 for Dr. Tanay. Id. Specifically, the motion requested funds to hire Dr. Brown and Dr. Tanay for the following reasons: (1) to present evidence to establish that Whisenhant was insane when he committed the crime, (2) to establish the relevant statutory mitigating circumstances, and (3) to assist defense counsel in cross-examining the State's more numerous mental health experts. Id.

Judge McRae, although granting Whisenhant's motion in part, stated that Whisenhant was not "entitled" to have the motion granted. Vol. 19 at 39-40. In that regard, the order stated:

> Defendant presented abundant psychiatric evidence at the first trial and the same evidence was available to him at the second trial and is still available to him. Had he desired to do so, Defendant could have read the psychiatric testimony from the first trial into the record before the jury at the second trial, and he could also do so now. The Defendant also could have subpoenaed at least one of his expert psychiatric witnesses to present live testimony at his second trial, and he can do so now. Dr. Claude Brown was a member of the Lunacy Commission, he testified on behalf of the Defendant at the first trial, and he was within the

> jurisdiction of the Court at the time of the second trial, and he still is. Dr. Brown has previously testified that he would obey a subpoena to testify again in this case.

Id. The order also noted that the Southern Poverty Law Center, Whisenhant's counsel, could easily provide the funds to provide psychiatric assistance at trial and that the failure to do so must be a "litigation tactic." Id. Nevertheless, the order granted up to $2,200, plus "reasonable expenses" "to hire an independent psychiatric expert to assist the Defendant in any way he and his counsel see fit." Id. at 40. The order noted however that if Dr. Brown was not retained, "the Court will enforce a subpoena to Dr. Brown and will see that he attends trial and testifies, since he was a member of the Lunacy Commission and is within the jurisdiction of the Court, if Defendant and his counsel desire that he do so." Id.

As a part of the Rule 32 proceedings, Whisenhant presented documents tending to show that District Attorney Chris Galanos, one of the prosecutors at the 1987 penalty phase trial, gave Judge McRae a draft order concerning the motion for funds to hire a psychiatrist. Vol. 36, at 314. Attached to the order was a handwritten note from Galanos that stated, among other things, that the order granting funds to hire a psychiatrist "enumerates facts intended to preclude Ake error during the guilt [sic] stage." Vol. 36, at 314. The handwritten note further stated "[l]et me know what you want to do." Vol. 36, at 314. The handwritten note is dated "2/4," presumably the day before the order granting funds to hire a psychiatrist was entered on February 5, 1987. Vol.

19, at 39-41. Galanos testified at the Rule 32 evidentiary hearing that he did not serve the draft order on counsel for Whisenhant.[2] Vol. 37 at 58. The draft order (that contains Galanos's handwritten revisions) and the order entered by Judge McRae are substantially the same. Judge McRae's order changed the format of the draft order, corrected a mistake caused by one of the revisions, and changed the amount of "$2,000" that was stated in the draft order to "$2,200."

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[2] For reasons unknown, Whisenhant's brief elevates the role of then-Assistant Attorney General (now Eleventh Circuit judge) Ed Carnes in the purported "clandestine scheme." The undisputed evidence demonstrates that District Attorney Galanos hand delivered the draft order to Judge McRae. Vol. 37 at 57-58. In addition, Whisenhant's brief (on more than one occasion) labels Judge Carnes as "lead counsel" at the 1987 penalty phase trial. However, the record of that trial reflects that Judge Carnes did not handle any witnesses nor did he make an opening statement or closing argument.

REASONS WHY THE PETITION SHOULD BE DENIED

The gist of Whisenhant's petition to this Court consists of this: he asks this Court to apply a standard that does not apply to his case. Whisenhant's sole claim of error is that the Court of Appeals should have considered whether the "probability of actual bias" on the part of Judge McRae violated due process.[3] However, as Whisenhant fails to acknowledge, this Court has only applied this objective standard in three limited instances: 1) when a mayor-judge benefited financially from a defendant's conviction; 2) when a judge was the object of a defendant's contempt; and,

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[3] In his petition to this Court, Whisenhant does not allege that Judge McRae was actually biased against him, although this claim was raised in the courts below. Therefore, the issue of whether Judge McRae was actually biased is not properly before this Court. Regardless, this claim was rejected by the state court and by the District Court below on habeas review. The Alabama Court of Criminal Appeals, in denying Whisenhant's claim of actual bias, held that Whisenhant "failed to offer any evidence of personal bias or partiality on the part of Judge McRae" and that "the order entered by Judge McRae granted [Whisenhant] all of the funds he had sought." The Federal District Court below held that it "cannot conclude that Judge McRae was actually biased or prejudiced against Whisenhant." (App. 124-25) That court went on to conclude that the fact that Judge McRae "apparently signed the State's proposed order granting a defense motion without input from the defense on the form of that order simply does not evince the kind of bias or prejudice that rises to the level of a constitutional violation" and therefore, held that "the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." (App.125-26)

as determined recently by this Court 3) when a person with an interest in a case provided extreme campaign contributions to the particular judge hearing that case.

The facts of Whisenhant's case do not fall within those categories. Accordingly, the Court of Appeals correctly determined that Whisenhant's case was not analogous to the situations noted above and that, therefore, Whisenhant was not entitled to relief under 28 U.S.C. § 2254.

I. THE STATE COURTS' DENIAL OF WHISENHANT'S CLAIM THAT THE STATE TRIAL JUDGE WAS BIASED AND IMPARTIAL WAS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW.

This case is not worthy of certiorari review because the Eleventh Circuit Court of Appeals correctly determined that the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by this Court. The Court of Appeals rejected Whisenhant's claim that Judge McRae's order during the 1987 penalty phase retrial created an "appearance of partiality" which violated his due process rights because that court found that there was no decision from this Court clearly establishing that the "appearance of bias or partiality" alone, absent actual bias, violated the Due Process Clause. Whisenhant v. Allen, 556 F.3d 1198, 1209 (11th. Cir. 2009). The Court of Appeals further rejected Whisenhant's claim that the "probability of actual bias" on the part of Judge McRae denied him due

process, noting that this Court had only identified certain situations in which the probability of actual bias became "constitutionally intolerable", namely, cases "in which the judge has a pecuniary interest in the outcome or has been personally abused or criticized by the party before him." Id. That court held that these judicial bias cases were not analogous to the facts of Whisenhant's case and that, therefore, the Alabama courts' denial of Whisenhant's claim was not contrary to, or an unreasonable application of, clearly established federal law. Id. at 1210.

In an effort to gain certiorari review in this Court, Whisenhant mischaracterizes the Court of Appeals' holding and further, ignores critical distinctions in this Court's precedent. Whisenhant claims that the Court of Appeals failed to apply the correct "objective standard" to determine when recusal is required and instead required Whisenhant to "establish actual judicial bias by showing that 'the judge has a pecuniary interest in the outcome of the case or has been personally abused or criticized by the party before him.'" Whisenhant's petition at p. 10. Whisenhant, citing Tumey v. Ohio, 173 U.S. 510 (1927), In re Murchison, 349 U.S. 133 (1955), and this Court's recent decision in Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252 (2009), argues that the Court of Appeals should have considered whether the facts involving Judge McRae led to a potential or probability for actual bias. Whisenhant's petition at pp. 11-12.

Whisenhant's assertion is flawed. No error occurred in this case. The Court of Appeals properly determined that the "probability of actual bias" standard did not apply to Whisenhant. That court

correctly concluded that, based on the facts of his case, Whisenhant's claim of judicial bias did not fall within the limited category of cases in which this Court has held that the probability of actual bias resulted in a violation of due process.

Whisenhant's problem is that his case simply does not fall into those limited categories. Notably, in his petition to this Court, Whisenhant ignores the specific circumstances in which this Court has held that the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35, 47 (1975). Further, Whisenhant makes no real attempt in his petition to articulate how the facts of his case align with the particular categories in which this Court has required recusal on due process grounds based on the "probability of actual bias." More importantly, there is no Supreme Court precedent on point to the situation presented by this case. Accordingly, the Court of Appeals correctly determined "that the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." Whisenhant, 556 F.3d at 1210.

A. The Legal Principles Announced In Tumey and Murchison Are Inapplicable To This Case.

Whisenhant contends that the state court applied a rule that contradicted the rule espoused in Tumey v. Ohio, 273 U.S. 510 (1927) and In re Murchison, 349 U.S. 133 (1955) and that the Court of Appeals likewise failed to apply this rule in reviewing the

state court decision. However, a federal court's review of a state court adjudication is limited to whether the state court decision was contrary to or an unreasonable application of the clearly established precedent of this Court. Williams v. Taylor, 529 U.S. 362, 412-413 (2000). Although not explicitly stated in his petition, Whisenhant apparently contends that it is "clearly established" that under the facts of his case – where a hand-delivered draft order, granting Whisenhant's motion for funds was not served on the defense – Judge McRae's recusal was required under the Due Process Clause based on "a probability of actual bias." Contrary to the view espoused by Whisenhant, this rule is far from clearly established; in fact, this Court has not established such a rule at all.

"A fair trial in a fair tribunal is a basic requirement of due process." Murchison, 349 U.S. at 136. The general guiding principle is that the "Due Process Clause clearly requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793 (1997). However, this Court has cautioned that "[a]ll questions of judicial qualification may not involve constitutional validity." Tumey, 273 U.S. at 523. In fact, "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." Bracy, 520 U.S. at 904.

This Court has traditionally required judicial recusal based on a probability of actual bias in only two specific instances, neither of which apply to

Whisenhant's case: 1) when a judge benefits financially from the outcome of a case and 2) when a judge was the object of a defendant's contempt. See Caperton, 129 S.Ct. at 2262. Tumey represents the first instance, in which a judge has a financial interest in the outcome of a case that leads to a constitutionally impermissible probability of actual bias. In Tumey, the defendant was arrested on charges of unlawfully possessing intoxicating liquors and was brought before the mayor of the village of North College Hill. 273 U.S. at 514. Under Ohio law, the mayor had authority to try cases involving the possession of alcoholic beverages. Additionally, state law provided that the mayor would receive fees for serving as a judge and for trying such cases; however, the mayor would only be paid fees if he convicted the defendants who appeared before him. Id. at 520. This Court then held that a defendant's due process rights were violated and that disqualification is required where, as in the facts presented in Tumey, a mayor/judge had a direct, personal, substantial pecuniary interest in reaching a conclusion against the defendant in that case. Id. at 523, 535.

Murchison exemplifies the second instance where a judge acted as a "one-man grand jury" and, through his prior relationship with the defendant, therefore, was the object of the defendant's contempt. In In re Murchison, 349 U.S. 133 (1955), this Court was called upon to address the constitutionality of a Michigan law that allowed the same judge who served as a "one-man grand jury" before which certain witnesses had testified to also preside over the contempt hearing where the same witness/defendants were found guilty of perjury. In

addition to his role of being a one-man grand jury and petit jury, the trial judge made a comment that he would personally investigate whether an apparent alibi offered by the defendant was untruthful. Id. at 137. The Murchison Court found that "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." Id. Accordingly, this Court ruled that "it was a violation of due process for the 'judge-grand jury' to try these petitioners, and it was therefore error for the Supreme Court of Michigan to uphold the convictions." Id. at 140.

Tumey and Murchison are off point as "clearly established precedent" in Whisenhant's case. They stand merely for the principles that a trial judge should be disqualified (1) when the judge has a pecuniary interest in the outcome of the case or (2) where state procedure allows for the trial judge to serve also as the grand jury and prosecutor, resulting in the judge becoming an object of the defendant's contempt. Put simply, the principles announced in Tumey and Murchison are not applicable – let alone "clearly" applicable – to this case. In the present case, after Whisenhant filed a motion before the 1987 penalty phase trial that requested funds to hire two hand-picked psychiatrists, Mobile County District Chris Galanos hand delivered a draft order to Judge McRae without serving a copy on defense counsel. However, Judge McRae's eventual order, although similar to the draft order which Galanos hand delivered to Judge McRae, granted Whisenhant's request for funds to hire mental health experts. The legal principles stated in Tumey and Murchison have no application because Judge McRae did not have anything like a pecuniary interest in the outcome of

the case and Judge McRae did not serve as a one-man grand jury or investigate the crime resulting in the defendant's contempt.

The Court of Appeals correctly identified these two limited instances in which this Court has held that recusal was required under the Due Process Clause based on a probability of actual bias on the part of a judge and correctly determined that Whisenhant's case did not fall within those categories. Specifically, that court held that "[i]t is clear that the judicial bias cases cited by Whisenhant involve totally different facts from his own case." Whisenhant, 556 F.3d at 1210. That court found that Whisenhant's case was neither analogous to Murchison, nor comparable to other decisions relied on by Whisenhant which involved criminal contempt proceedings in which the judge was "the one reviled by a contemnor." Id. at 1209-10. However, as the Court of Appeals determined, Whisenhant's case was "totally different": there was no evidence that Judge McRae was involved in a "running controversy" with Whisenhant, no personal attacks were made by any party, Judge McRae never displayed a hostile attitude towards Whisenhant, and most importantly, Judge McRae's order granting Whisenhant's motion for funds benefitted the defense. Id.

The standard which Whisenhant espouses for reviewing his claim of judicial bias simply does not apply to his case. Whisenhant ignores the clear cut factual scenarios in which this Court has reviewed whether the "probability of actual bias" warrants recusal because plainly, his case does not fall into such limited instances. Attempting to support his contention that the Court of Appeals wrongly held that "the potential for actual bias" standard has only

been applied in limited instances by this Court, Whisenhant cites a list of cases in which he claims this Court has identified "numerous factual circumstances where the potential for judicial bias was too great to be constitutionally tolerable." Whisenhant's petition at p. 13. However, Whisenhant's analysis of this Court's decisions regarding judicial bias misses the mark.

The cases cited by Whisenhant in his petition do not support his argument, but instead, support the complete opposite conclusion, which was reached by the Court of Appeals. All of the cases cited by Whisenhant fall neatly within the two limited instances in which this Court has held that recusal is required under the Due Process Clause based on a "probability of actual bias": 1) when a judge benefits financially from the outcome of a case and 2) when a judge was the object of a defendant's contempt. See Tumey v. Ohio, 273 U.S. 510 (1927) (judge benefited financially from outcome of case); Offutt v. United States, 348 U.S. 11 (1954) (judge was object of defendant's contempt); In re Murchison, 349 U.S. 133 (1955) (judge was object of defendant's contempt); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (judge was object of defendant's contempt); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (judge benefited financially from outcome of case); Aetna Life Ins. Co v. Lavoie, 475 U.S. 813 (1986) (judge benefited financially from outcome of case). Whisenhant's petition at pp. 13-14. The facts of Whisenhant's case do not compare with the facts of those cases in which this Court has found that the probability of actual bias warrants recusal.

Tumey, Murchison, and their progeny have no application in deciding whether the Alabama courts'

decision was contrary to clearly established Supreme Court precedent. Whisenhant has not cited a decision from this Court that discusses the situation where a trial judge receives a draft order from the prosecutor that is not served on defense counsel but grants the relevant motion filed by defense counsel. Thus, the state court decision is not contrary to, nor an unreasonable application of, clearly established federal law as determined by this Court.

B. The Legal Principles Recently Announced By This Court in Caperton Are Also Inapplicable to Whisenhant's Case.

This Court's recent decision in Caperton does not provide any support to Whisenhant's claim that the Alabama courts' denial of his judicial bias claim was contrary to, or involved an unreasonable application of, clearly established federal law; nor does the Court of Appeals' holding below conflict with Caperton. The legal principles announced in Caperton are off point and the extreme facts of Caperton are not present in Whisenhant's case.

Claiming that the Court of Appeals' holding is in "direct conflict" with this Court's precedent, Whisenhant contends that the Court of Appeals failed to follow the rule reaffirmed in Caperton that "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias." 129 S.Ct. at 2263; Whisenhant's petition at p. 11. However, Whisenhant fundamentally misconstrues this Court's holding in Caperton. Contrary to Whisenhant's suggestion, this Court did not announce a rule that all claims of judicial bias raised under the Due Process Clause do not require

proof of actual bias. Instead, this Court acknowledged in Caperton that the objective standard of inquiring into the probability of actual bias in judicial bias cases had only been applied in two instances: 1) when a mayor-judge benefited financially from a defendant's conviction and 2) when a judge was the object of a defendant's contempt. See Caperton, 129 S.Ct. at 2259-2262. This Court simply extended this objective standard in a limited fashion to claims of judicial bias in which a person with an interest in a case provided extensive campaign contributions to the particular judge hearing that case.

Specifically, this Court concluded that "there is a serious risk of actual bias-based on objective and reasonable perceptions-when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Id. at 2263-2264. This Court further noted that even among judicial bias cases involving campaign contributions and election, that the facts of Caperton were extreme and that "[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances." Id. at 2265, 2267.

Accordingly, Caperton is off-point as "clearly established precedent" in the context of Whisenhant's case. The facts which comprise Whisenhant's claim of judicial bias regarding Judge McRae have nothing to do with raising campaign funds or directing Judge McRae's election campaign. Moreover, nothing in Caperton requires a state court under the Due Process Clause to consider a judge's "probability of actual bias" in a factual situation

where a judge receives a proposed order – benefiting the defendant – that was not served on the defense.

Even if Caperton could be stretched beyond its holding to apply to this specific factual situation – although it does not apply – Whisenhant would still not be entitled to habeas relief because the state courts' decision must be viewed through the deferential lens of AEDPA. See 28 U.S.C. § 2254. At the time of the state court Rule 32 proceedings, Caperton had not been decided and thus, the legal principles announced in Caperton were not "clearly established" for purposes of reviewing the state courts' decision. See 28 U.S.C. § 2254(d) (1). In any event, this Court need not go that far in its review because the legal principles announced in Caperton simply do not apply to the facts of Whisenhant's claim.

Therefore, the Court of Appeals' determination that Whisenhant's case did not fall within the limited instances in which this Court has held that the "probability of actual bias" on the part of a judge requires recusal under the Due Process Clause is correct, even in light of Caperton. More important to the immediate question before this Court, the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of clearly established law as determined by this Court. 28 U.S.C. § 2254(d).

CONCLUSION

The Court should deny Whisenhant's petition for writ of certiorari.

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In The
Supreme Court of the United States

THOMAS WARREN WHISENHANT,

Petitioner,

v.

RICHARD ALLEN, Commissioner of the Alabama Department of Corrections,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO THE BRIEF IN OPPOSITION

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Contrary to the contention of the State of Alabama, this case involves the application of long-established, bedrock principles of constitutional law: first, that due process requires a trial before a tribunal free from the probability of bias; and second, that this right is violated when the judge has an interest in obtaining a conviction or takes on the role of the prosecutor and judge in the same case. In this case, the uncontested facts demonstrate that these violations occurred and that the State tried to cover them up. The trial judge in this very high-profile murder case had sentenced the defendant to death twice and faced the embarrassment of being twice reversed. During the third trial, the judge colluded, *ex parte,* with prosecutors to paper over error in the second trial in order to preclude the possibility of reversal during habeas. The judge's interest in obtaining a conviction and the probability of bias were clear. This Court should not allow a death sentence to stand under such circumstances.

1. The case law upon which Mr. Whisenhant relies is not new; it was clearly established long before his trial. As this Court has held, "[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). It has long been established that "a fair trial in a fair tribunal is a basic requirement of due process," and that this requirement is violated, not only when the judge's actual bias is proven, but also where there is "even

the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). In the Court's jurisprudence, appearances are important: "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Consequently, due process does not allow a judge "to try cases where he has an interest in the outcome," regardless of whether the evidence establishes actual bias. *Id.*

Contrary to the State's position, this Court has never limited this generalized due process standard by defining an exclusive list of circumstances in which a judge can be said to have an unconstitutional interest in the outcome. Instead, the Court has opined, "[I]nterest [in the outcome] cannot be defined with precision. Circumstances and relationships must be considered." *Id.* Among the many circumstances in which the Court has found an unconstitutional probability of unfairness are where the judge has an interest in obtaining a conviction, and where the judge takes on the role of prosecutor and judge in the same case. *Murchison*, 349 U.S. at 137. Such a situation occurred here when Judge McRae joined with the prosecution *ex parte* to prevent future reversal and ensure that Mr. Whisenhant would be executed. While Mr. Whisenhant's life hung in the balance, judicial integrity, "a state interest of the highest order," was severely compromised. *Caperton v. A.T. Massey Coal Co.*, ___ U.S. ___, 129 S. Ct. 2252, 2267 (2009) (citation omitted).

2. The State of Alabama does not contest the fact that Judge McRae knew that the prosecution was providing him, *ex parte,* with a proposed order written by then-Assistant Attorney General Ed Carnes. By entering Mr. Carnes' *ex parte* proposed order, Judge McRae stepped beyond the role of neutral arbiter and became an advocate for execution.

The *ex parte* draft Mr. Carnes wrote for Judge McRae contained a lengthy attempt to justify the denial of funds during the second trial years earlier. The issue regarding the second trial was not before the court; this unnecessary discussion was designed solely to ensure that Mr. Whisenhant's conviction would withstand future habeas review. Rather than simply rule on the request that was before him, Judge McRae, with the *ex parte* assistance of Mr. Carnes, took on the prosecutorial role of trying to ensure that Mr. Whisenhant would be executed. With this act of *ex parte* collusion, Judge McRae crossed the line from judge to advocate for the prosecution. This partisan judicial behavior eviscerated the "appearance of justice" and denied Mr. Whisenhant due process of law.

3. The State argues that, regardless of the *ex parte* collusion, Judge McRae's decision to grant the defense $2200 in funds in the order drafted by Mr. Carnes precludes a finding of unconstitutional bias. The granting of funds for the third trial does not prove a lack of bias: it reflects the fear that denial of expert funds would cause a later reversal and the desire to preserve the conviction. Indeed, the order

explained that the defense was not entitled to funds, but granted them anyway. The decision furthered the overall purpose of the *ex parte* order: error-proofing the record to avoid another embarrassing retrial. It would make no sense to spend time papering over one error while taking the chance of introducing a new one.

Avoiding error was the express reason that Ed Carnes was involved in the case at all. At the time of the 1987 retrial, now-Judge Carnes was the head of the death penalty unit in the Alabama Attorney General's Office. Prior to the start of the 1987 retrial, then-Attorney General Don Siegelman issued a press release announcing that he was appointing a special prosecution team for the case, and in particular was assigning Assistant Attorney General Carnes to the case "to insure that no technical or reversible errors are made in the state's presentation of the case." (R. at Vol. 31, p. 2122.) Siegelman expressly did this to fulfill a campaign promise "to hire the best possible prosecutors and work closely with the District Attorneys" and "to make this retrial the last one for Thomas Whisenhant." (R. at Vol. 31, p. 2121-22.)

Given the surrounding circumstances and the tenor of the order, it is facetious to suggest that Judge McRae's partial grant of funds requested by the defense shows a lack of bias. All it shows is a determination to see Whisenhant executed.

4. The State also does not contest the obvious and embarrassing fact that current Eleventh Circuit

Judge Carnes – prior to his appointment to the bench – hid the evidence of his *ex parte* contacts with Judge McRae after being ordered to open the prosecution file for discovery during state habeas proceedings. Instead, the State tries to minimize this shockingly unethical conduct by denying that Judge Carnes ever served as the lead lawyer for the prosecution. (Brief in Opposition at 8, n.2.) This claim is indisputably false.

As the State is aware, District Attorney Galanos testified during the habeas corpus proceedings that Judge Carnes served as the "lead attorney" on the prosecution for the 1987 retrial and "was basically calling the shots." (R. at Vol. 37, p. 47.) Indeed, although the case was based in Mobile, the litigation file was kept more than a two-hour drive away in Montgomery, at the Attorney General's Office where Carnes worked. (R. at Vol. 37, p. 47-8.) And as mentioned above, then-Attorney General Siegelman issued a press release announcing that Carnes would work on the case to ensure that no legal errors were committed. Having tried to hide the evidence of its *ex parte* contacts, the State should not be heard to minimize the significance of the transgressions that occurred here.

5. The judge's neutrality is nowhere more important than in an Alabama death penalty case in which judges, not juries, make the ultimate decision of whether a defendant will live or die. In such a case, the judge's role goes beyond merely deciding questions of law; the judge is the fact-finder who

weighs whether the aggravating circumstances outbalance the mitigating ones. In this case, the judge was presented with substantial evidence that Mr. Whisenhant's severe mental illness led to his crimes. Judge McRae faced the most controversial, important, and morally challenging decision any judge can be called upon to make. A justice system that allows a decision of this magnitude to be made by a judge infected with bias against the defendant deserves the greatest condemnation.

Certiorari should be granted to review the decision below.

Respectfully submitted,

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